

# Ohio Partnership Law and The Uniform Partnership Act

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## INTRODUCTION

The Uniform Partnership Act<sup>1</sup> is part and parcel of the work of the Commissioners on Uniform State Laws designed to achieve as far as possible a single set of legal principles for the entire country in the area of commercial law. Under the direction of the Commissioners, the Uniform Negotiable Instruments Act,<sup>2</sup> the Uniform Sales Act,<sup>3</sup> the Uniform Warehouse Receipts Act,<sup>4</sup> and the Uniform Bills of Lading Act<sup>5</sup> had previously been drafted and recommended for adoption.

Partnership law as a part of commercial law would seem peculiarly susceptible to uniform treatment. At common law not only are there diverse results in different states on many partnership problems, but there often exist confusion of theory and conflict of decision within a single jurisdiction. Then too, the courts of most jurisdictions have not spoken on many vital issues. Furthermore, there appears to be no outstanding local policy to obstruct the way of uniformity.

A necessary incident to uniformity is codification, and an obviously desirable approach is the embodiment, so far as practicable, of principles already existent in the common law. Accordingly the Act, for the most part, is a restatement of those common-law principles that prevail throughout the decisions of most states. Only in a few instances does it deviate; and in most of these the principle expressed had previously been enunciated by the courts of at least one jurisdiction.

Work on the Act was commenced in 1902. James Barr Ames, Dean of the Law School of Harvard University, was employed to make the original draft. Careful consideration was given its preparation. In 1909, it had reached the state of a Second Tentative

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<sup>1</sup> Referred to throughout this paper as THE "Act."

<sup>2</sup> Proposed for adoption in 1896.

<sup>3</sup> Proposed for adoption in 1906.

<sup>4</sup> Proposed for adoption in 1906.

<sup>5</sup> Proposed for adoption in 1909.

Draft. Then Dean Ames died. In 1910, Dr. Wm. Draper Lewis, then Dean of the Law School of the University of Pennsylvania, was requested to proceed with the work. Both draftsmen drew on the English Partnership Act of 1890 for large portions of their work just as the draftsmen of the Uniform Negotiable Instruments Act and the Uniform Sales Act had drawn on the previous English codifications of those areas of the commercial law. Finally in October, 1914, the Commissioners approved the Act and recommended its adoption. No previous Uniform Act had had so much time devoted to its preparation.

Appropriately enough, Pennsylvania, where Dean Lewis had done most of the work on the Act was the first state to adopt it. This was on July 1, 1915.<sup>6</sup> Wisconsin followed five days later.<sup>7</sup> But by 1920, only twelve states or territories had adopted it.<sup>8</sup> Five more adopted it in the twenties<sup>9</sup> and three in the thirties.<sup>10</sup> The Act was not receiving the reception that had been accorded other Uniform Acts dealing with commercial law subjects. However, in the forties a resurgence occurred. Eight states adopted the Act, three of these adoptions being in 1947.<sup>11</sup> It is now in force in twenty-eight states and territories.

Since the Act has been in effect in some jurisdictions for over thirty years, there now exists a considerable body of judicial decision by which to test it in operation. This material will be of substantial aid to any legislature having its adoption under consideration, and ultimately to the courts of any state which may now enact it.<sup>12</sup> This is particularly true in view of Section 4(4) of the Act which states that it "shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it."

The Act has been previously introduced in either one or both

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<sup>6</sup> PA. STAT. ANN. Tit. 59, §§ 1-105 (1930).

<sup>7</sup> WIS. STAT. §§ 123.01-123.38 (1945).

<sup>8</sup> Besides Pennsylvania and Wisconsin, they were: Alaska (1917); Idaho (1920); Illinois (1917); Maryland (1916); Michigan (1917); New Jersey (1919); New York (1919); Tennessee (1917); Virginia (1918); Wyoming (1917).

<sup>9</sup> California (1929); Massachusetts (1923); Minnesota (1921); South Dakota (1923); Utah (1921).

<sup>10</sup> Colorado (1931); Nevada (1931); Oregon (1939).

<sup>11</sup> Arkansas (1941); Delaware (1947); Montana (1947); Nebraska (1943); New Mexico (1947); North Carolina (1941); Vermont (1941); Washington (1945). Undoubtedly an increased use of the partnership form of business because of heavy corporate taxes during the war caused the revival of interest in the Act.

<sup>12</sup> Williams, *The Uniform Partnership Act Comes to Nebraska*, 22 NEB. L. REV. 215, 251 (1943).

of the houses of the General Assembly of Ohio.<sup>13</sup> It is the purpose of this article to indicate the changes that would be made in the present law of Ohio, both common law and statute, if the Act were to be finally adopted here today.<sup>14</sup>

#### THE LEGAL THEORY OF THE ACT

Much discussion has been devoted to the nature of the partnership relation.<sup>15</sup> Is a partnership a separate legal entity or juristic person distinct from the individuals who compose its membership? Or is it merely the group attributes of those individuals, the partnership as such having no separate rights and duties? The first view is known as the entity or mercantile view, and is accepted in the civil-law countries; the second is ordinarily referred to as the aggregate or common-law theory.

To describe a partnership as an entity is admittedly to indulge in a fiction. As convenient means to ends, fictions can and do often serve useful purposes. But in them there ever lurks the danger that the means will in time come to be thought of as itself the end, that in the thinking of lawyers and courts the fiction will replace reality and will give rise to a new and difficult set of problems of its own. This has oftentimes happened in corporation law.<sup>16</sup>

Regardless of the tendency in common parlance to treat "the firm" as if it had an existence apart from its members, the Ohio

<sup>13</sup> The latest occasion was H. B. 289, 97th General Assembly of Ohio, reported favorably from Judiciary Committee of the House.

<sup>14</sup> There is considerable law review literature indicating the effect of the Act on the previously existing partnership law of particular states. Richards, *The Uniform Partnership Act*, 1 WIS. L. REV. 5, 90 (1920) (Wisconsin law); Trotter, *The Uniform Partnership Act and Its Effect Upon the West Virginia Decisions and Statutes*, 27 W. VA. L. Q. 28, 158 (1920); Note, *The Uniform Partnership Act—New York's Failure to Adopt It*, 18 COL. L. REV. 582 (1918); Wright, *California Partnership Law and the Uniform Partnership Act*, 9 CALIF. L. REV. 117, 206, 306, 391 (1921); Ballantine, *Adoption of Uniform Partnership Act in California*, 17 CALIF. L. REV. 623 (1929); Williams, *The Uniform Partnership Act Comes to Nebraska*, 22 NEB. L. REV. 215 (1943); *Uniform Partnership Law with Oregon Notes*, 19 ORE. L. REV. 190 (1940), 20 ORE. L. REV. 96 (1940), 22 ORE. L. REV. 207 (1942).

<sup>15</sup> Drake, *Partnership Entity and Tenancy in Partnership: The Struggle for a Definition*, 15 MICH. L. REV. 609 (1917); Cowles, *The Firm as a Legal Person*, 57 CENT. L. J. 343 (1903); Burdick, *Some Judicial Myths*, 22 HARV. L. REV. 393 (1909); WARREN, *CORPORATE ADVANTAGES WITHOUT INCORPORATION* c. II (1929); Lewis, *The Uniform Partnership Act*, 24 YALE L. J. 617 (1915); Crane, *The Uniform Partnership Act, A Criticism*, 28 HARV. L. REV. 762 (1915); Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 158, 291 (1915, 1916); Crane, *The Uniform Partnership Act and Legal Persons*, 29 HARV. L. REV. 838 (1916); Note, 41 COL. L. REV. 698 (1941).

<sup>16</sup> *Old Dominion Copper Mining and Smelting Co. v. Lewisohn*, 210

cases overall have taken the aggregate position.<sup>17</sup> It must be admitted that occasional language implies recognition of an entity, but usually this is used in a context wherein the court is distinguishing between the business in which persons engage as partners and that which they carry on as individual undertakings.<sup>18</sup> Further, Ohio by statute does permit partnerships to sue and be sued in their firm names.<sup>19</sup> This, of course, is inconsistent with the aggregate view since under the latter the partnership as such has no capacity to sue or be sued; suits must be brought by and against the partners jointly as individuals.<sup>20</sup> As a matter of fact, suits may now be brought by or against all jointly, or the firm as such, or both together. This is but a matter of procedure in respect to parties litigant. In no respect does it qualify the substantive nature of the relation.<sup>21</sup>

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U.S. 206 (1908). See Mr. Justice Black, dissenting in *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 83 (1938).

<sup>17</sup> *Byers v. Schluppe*, 51 Ohio St. 300, 38 N.E. 117 (1894); *McMillen v. Industrial Commission*, 13 Ohio App. 310, 32 Ohio C.C. (N.S.) 285 (1920); *Ford v. State*, 11 Ohio C.C. (N.S.) 324 (1908), *aff'd without opinion*, 80 Ohio St. 722, 89 N.E. 1125 (1909); *Du Pont du Nemours Powder Co. v. Jones Bros.*, 200 Fed. 638 (S.D. Ohio 1912). See *Barger-Mitchell Motor Co. v. Levy*, 34 Ohio App. 84, 170 N.E. 443 (1929).

<sup>18</sup> In *Andres v. Morgan*, 62 Ohio St. 236, 244, 56 N.E. 875, 877 (1900) it is stated that "A partnership is a *quasi* legal entity. It owns property and has liabilities as such." This statement is made to demonstrate that partnership property is subject to the debts of firm creditors and that the property cannot be fraudulently conveyed so as to defeat the rights of the firm creditors. It does not indicate that the partnership is a separate juristic person but stands for the proposition that the assets of the partners devoted to the partnership business must answer to those who deal with partners as such. In *United States Printing and Lithographing Co. v. Crites*, 15 Ohio App. 63 (1921), *motion to certify overruled*, 19 Ohio L. Rep. 466 (Sup. Ct. 1921) the court held that a contract to furnish all labels needed by a partnership terminated when the partnership business was sold by the partners and that the contract was not one to furnish the individual partners all the labels they needed in whatever enterprise they might be engaged. A business apart from the separate undertakings of the partners was recognized but not as a juristic person or legal unit. But see *West v. The Valley Bank*, 6 Ohio St. 168 (1856); *First National Bank v. Cochran*, 8 Ohio N.P. 696 (1901); *Deglow v. Kruse*, 2 Ohio N.P. 235 (1894).

<sup>19</sup> OHIO GEN. CODE § 11260 (1938).

<sup>20</sup> MECHEM, *ELEMENTS OF THE LAW OF PARTNERSHIP* § 328 (2d ed. 1920); BURDICK, *THE LAW OF PARTNERSHIP* c. III (2d ed. 1906).

<sup>21</sup> In *Whitman v. Keith*, 18 Ohio St. 134, 144 (1868) it is stated that "The purpose of this statute was to give to every partnership of the kind which it describes, a status *in court* as a person, an artificial or ideal person. . . ." (Emphasis supplied.) *Barger-Mitchell Motor Co. v. Levy*, 34 Ohio App. 84, 170 N. E. 443 (1929), *Ungerleider v. Ewers*, 20 Ohio App. 79, 153 N.E. 191 (1925), *motion to certify overruled*, 23 Ohio L. Rep. 589 (Sup. Ct. 1925). One Ohio case has broadly stated that the effect of the statute is to make the partnership an entity in substance as well as procedure. First

The Act's original draftsman, Dean Ames, was a supporter of the entity theory. He prepared several drafts based on that approach. After the death of Dean Ames, Dean Lewis submitted two drafts to the Commissioners, one based on each view. Experts from the practice and teaching field were called in. It was thereupon unanimously decided to adopt the aggregate approach as the one which would cause the least disruption in existing law.<sup>22</sup>

#### THE ESTABLISHMENT OF THE PARTNERSHIP RELATION

The most frequently litigated problem in the law of partnership occurs at the very threshold: what set of facts constitutes a partnership? It has never been questioned since the famous opinions of the Law Lords in 1860 in *Cox v. Hickman*,<sup>23</sup> that the field of law we now label "partnership" is but a branch of the law of agency. Indeed, it was Lord Cranworth's relegation of profit sharing to the position of evidence of the ultimate fact of agency that has made that case a landmark in English and American common law. Sixteen years later, the Supreme Court Commission of Ohio expressed this same basic principle in the words ". . . the foundation of the liability of one partner for the acts of another is the relation they sustain to each other, as being each principal and agent."<sup>24</sup> The true test of a partnership relation, at last, is left to be that of the relation of the parties as principal and agent."<sup>24</sup>

While the Act<sup>25</sup> makes sharing in profits *prima facie* evidence of the partnership relation, instead of "cogent often conclusive" evidence of the agency relation as stated in *Cox v. Hickman*, the difference would seem more in vocabulary than in substance. The Act defines a partnership as "an association of two or more persons to

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National Bank v. Cochran, 8 Ohio N.P. 696 (1901). The cases cited, note 17 *supra*, indicate that such is not the effect of the statute. The Act by its reaffirmance of the aggregate theory as a matter of substantive law would of course, have no effect on General Code Section 11260 which is a matter of procedure.

<sup>22</sup> When Nebraska adopted the Uniform Partnership Act in 1943, it adopted the entity theory by substituting in Section 6 (1) of the Act "partnership is an association of persons organized as a separate entity to carry on business for profit." NEB. REV. STAT. § 67-306 (1943). A commentator on the Nebraska Act was doubtful that the difference in definition would affect the result of cases. Williams, *The Uniform Partnership Act Comes to Nebraska*, 22 NEB. L. REV. 215, 219 (1943).

<sup>23</sup> 8 H.L. Cas. 268, 11 Eng. Rep. 431 (1860).

<sup>24</sup> *Harvey v. Childs*, 28 Ohio St. 319, 321, 322 (1876). Some later Ohio cases adopting this test are: *Valentine v. Hickie*, 39 Ohio St. 19 (1883); *Southern Ohio Pub. Service Co. v. Public Utilities Commission*, 115 Ohio St. 405, 154 N.E. 365 (1926); *Goubeaux v. Krickenberg*, 126 Ohio St. 302, 185 N.E. 201 (1933).

<sup>25</sup> THE ACT § 7 (4).

carry on as co-owners a business for profit,"<sup>26</sup> and Ohio has paralleled with "a contract of an association by which two or more contribute money, goods, or labor, to the end that the profit may be ratably divided between them."<sup>27</sup> The same insubstantial difference is discernible here. Again, both the Act and the Ohio cases have been at pains to contrast certain other relationships which are characteristically difficult to distinguish from partnerships.

Thus the Act states that no "inference of a prima facie case should be drawn if such profits were received in payment" of a debt, as wages or rent, as an annuity to a deceased partner's widow, as interest on a loan, or as consideration for the sale of good will or other property.<sup>28</sup> Further, the sharing of gross returns as distinguished from profits "does not of itself establish a partnership."<sup>29</sup> Counterparts of most of these elaborations will be found in the Ohio cases.<sup>30</sup>

As a practical matter, therefore, and disregarding occasional trivial verbiage, the Act does not in this respect change the substantive law of Ohio. Its contribution is not insignificant, however, since its expression is more concise and unequivocal than can be found in the sum total of the many Ohio cases.<sup>31</sup>

Thus far nothing has been said to indicate that it makes a difference whether a third person is claiming that a partnership relation exists or whether one of the alleged partners himself makes such a claim. One Ohio case has suggested that even in the absence of estoppel parties might be partners as to third persons though not

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<sup>26</sup> THE ACT § 6 (1).

<sup>27</sup> *Aspinwall v. Williams*, 1 Ohio 84, 95 (1823).

<sup>28</sup> THE ACT § 7 (4).

<sup>29</sup> THE ACT § 7 (3).

<sup>30</sup> *Coleman v. LaBounty Amusement Co.*, 21 Ohio App. 44, 153 N.E. 90 (1925), *motion to certify overruled* June 23, 1925, (sharing portion of gross receipts as rent). See *Wood v. Vallette*, 7 Ohio St. 172 (1857) (sharing in gross profits does not establish partnership). Cf. *Mosier v. Parry*, 60 Ohio St. 388, 54 N.E. 364 (1899) (position of vendor excludes concept of partnership with vendee). But see *Second National Bank v. Messinger*, 13 Ohio C.C. 561, 6 Ohio C.D. 197 (1895) (creditor held liable as partner).

It should be further noted that the Act also enumerates "joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property or part ownership" as "not of itself" establishing a partnership, "whether such owners do or do not share any profits made by use of the property." THE ACT § 7 (2). Several Ohio *nisi prius* decisions involving co-ownership cases are to the same effect, but the issue is rarely raised. For full discussion see LINDLEY, *PARTNERSHIP* 27, 31-33 (10th ed. 1935).

<sup>31</sup> A critic of the Act takes the position that the Act has sharpened the tools which the courts use to determine the existence of a partnership. Crane, *Twenty Years Under the Uniform Partnership Act*, 2 U. OF PITT. L. REV. 120 (1936).

so among themselves.<sup>32</sup> No Ohio case, however, actually has so held, and the Act expressly repudiates this possibility.<sup>33</sup>

It is apparent, however, that under certain circumstances a partnership, just as an agency, may be found to exist as to third persons although none exists as between the parties. This, of course, rests upon the doctrine of estoppel; and occasions the recognition of what is sometimes called an "apparent" as distinguished from an actual relationship. It is not founded on the actual presence of the indicia discussed above; but on the broad proposition of law that even in the absence of such facts, a person who creates or who knows of the existence of a false impression is under such a moral responsibility as to justify his being treated as though the impression were in fact true.<sup>34</sup> The application of this principle is restricted to such persons as have been misled into reasonable reliance on this appearance, for only these are the victims of irresponsibility.<sup>35</sup>

Under the Act, partnership liability can only exist where a person represents himself to be or consents to the representation of himself as a member of an existing partnership.<sup>36</sup> If the representation is that he is a partner of one or more persons who are not partners, then a joint liability exists rather than a partnership liability.<sup>37</sup> Since, as will be seen, a partner's contractual obligation is joint anyway,<sup>38</sup> there is no practical difference as to the existence of this liability as a matter of substantive law in the two types of cases. On the other hand there may be a substantial difference in the priorities involved in the distribution of assets in a court of equity

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<sup>32</sup> *Wood v. Vallette*, 7 Ohio St. 172, 178 (1857). See *Daly v. Savage*, 12 Ohio App. 471, 473 (1920).

<sup>33</sup> THE ACT § 7 (1).

<sup>34</sup> *Reber & Kutz v. Columbus Machine Mfg. Co.*, 12 Ohio St. 175 (1861); *Speer v. Bishop*, 24 Ohio St. 598 (1874); *Cook v. Penrhyn Co.*, 36 Ohio St. 135 (1880); *Russell v. Fenner*, 21 Ohio C.C. 527, 11 Ohio C.D. 754 (1901); *Pastor v. Rosenbaum*, 12 Ohio L. Abs. 486 (App. 1932). Occasional decisions elsewhere have asserted an affirmative duty to "do all that a reasonable and honest man should do, under similar circumstances" to repudiate the false impression. *Fletcher v. Pullen*, 70 Md. 205, 16 Atl. 887 (1889); Note, 1918D L.R.A. 505. The Commissioners have viewed Ohio as of this opinion, but an examination of the cases fails to show recognition, it is believed, of such an affirmative obligation. The Commissioners in their note to Section 7 of the Act [7 UNIFORM LAWS ANN. 24 (1938)] cite *Speer v. Bishop*, 24 Ohio St. 598 (1874). It would appear, however, that the Supreme Court in that case was of the opinion that the defendant had in fact consented to the use of his name by his son. *Dignan v. Brandon Oil Co.*, 49 N.E. 2d 576 (Ohio App. 1931) supports the view that a person falsely represented as a partner is under no duty to repudiate that representation. The Act, Section 16 (1) is in agreement.

<sup>35</sup> *Sohn v. Freiberg & Freiberg*, 6 Ohio Dec. Rep. 1175 (Dist. Ct. 1883).

<sup>36</sup> THE ACT § 16.

<sup>37</sup> THE ACT § 16 (1) (b) and (2).

<sup>38</sup> THE ACT § 15 (b).

in the event of insolvency. This will be discussed in a later section dealing with that question.<sup>39</sup>

Once a partnership has been established, it continues to exist for the duration of the undertaking specified in the agreement or for the definite term agreed upon unless earlier dissolved.<sup>40</sup> Most partnerships are at will and thus may be terminated at any time by any partner without liability.<sup>41</sup> The Act provides that, where a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking, the partnership becomes one at will and is not automatically brought to an end by the expiration of the fixed period or culmination of the particular undertaking.<sup>42</sup>

#### THE EFFECT OF THE ACT ON EXISTING PARTNERSHIPS AND OTHER FORMS OF PARTNERSHIP

The Act provides that it "shall not be construed so as to impair the obligations of any contract existing when the act goes into effect."<sup>43</sup> Since the partnership relation is contractual, it is clear that this provision protects all pre-existing partnerships. However, certain provisions to be discussed later—such as real estate conversion, dissolution, winding up, charging order, and the application of assets to the payment of debts—have already been construed in some jurisdictions to apply to partnerships existing at the effective date of the Act.<sup>44</sup>

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<sup>39</sup> The foregoing discussion has related to general partnership. Such specialized varieties as joint stock companies, mining partnership and one type of business trust will be discussed in the section immediately to follow.

<sup>40</sup> See *Scott v. Clark*, 1 Ohio St. 382 (1853); *Jones v. Jones*, Ohio C.C. 260, 10 Ohio C.D. 71 (1898); *THE ACT* § 31 (1) (a).

<sup>41</sup> See *Eagle v. Bucher*, 6 Ohio St. 295, 300 (1856); *THE ACT* § 31 (1) (b); § 23 (1).

<sup>42</sup> *THE ACT* § 23 (1). This situation appears not to have been commented upon in any Ohio case.

<sup>43</sup> *THE ACT* § 4 (5).

<sup>44</sup> *Wharf v. Wharf*, 306 Ill. 79, 137 N.E. 446 (1922), involving change in Illinois law brought about by Act treating all real property of partnership as converted into personal property "out and out" rather than merely to extent needed for partnership debts. The court held this applied to a firm formed in 1911. The firm had bought the property in question in 1911 and had dissolved in 1921, four years after the passage of the Act in Illinois. The case is criticized in 10 CORN. L. Q. 72 (1925); *Froess v. Froess*, 284 Pa. 369, 131 Atl. 276 (1925) (dissolution and winding up provisions of the Act applied to a partnership formed before passage of the Act in Pennsylvania); *Crossman v. Gibney*, 164 Wis. 395, 160 N.W. 172 (1916) (holding to the same effect in Wisconsin). See *Hobbs v. Virginia Nat. Bank of Petersburg*, 147 Va. 802, 128 S.E. 46 (1925) (raising question as to whether Section 16 of Act applied to holding out of defendant as partner prior to and after passage of Act in Virginia). In *Gerding v. Baier*, 143 Md. 520, 122 Atl. 675 (1923) the court held that in view of Section 4 (5) of Act a provision con-



It must be borne in mind also that the term "partnership" includes joint stock companies, mining partnerships, and a certain type of business trust.<sup>45</sup> Thus, a joint stock company is essentially a partnership with transferable shares. This negates the usual characteristic of *delectus personae* and as a logical necessity precludes dissolution by transfer either *inter vivos* or at death. Ordinarily, the number of shareholders is large; and as a matter of administrative convenience, the management is entrusted to a group chosen by the membership and having exclusive authority to bind the concern.<sup>46</sup> Although the creature of statute in a few states,<sup>47</sup> in Ohio these are common-law partnerships resting on contract.<sup>48</sup> The term business, or Massachusetts, trust has been indiscriminately applied to two types of relationships, both originating from contract and both having trust features with transferable shares representing equitable rather than legal interests. One of these is in reality a variety of joint stock company, the other is not, but is a true trust and need not concern us here. The difference lies in the presence or absence of an agency, which in turn depends upon whether the practical control over the trustee rests in the shareholders or not.<sup>49</sup> Since partnership is but an aspect of the law of agency, it is apparent that only the former variety is classifiable as a partnership, or more accurately, in view of the transferable shares, as a joint stock company. Like most states, Ohio has recognized the validity of both forms of organization.<sup>50</sup>

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tained in the partnership agreement executed before passage of Act in Maryland would be enforced.

<sup>45</sup> Brief note should be made of another relationship referred to in the cases as "joint adventures." The early Ohio view was that these constituted merely a variety of partnership. *Yeoman v. Leshy*, 40 Ohio St. 190 (1883); *Halett v. Fairbanks*, 40 Ohio St. 233 (1883). However, the latest pronouncement of the Ohio Supreme Court treats a joint adventure as a special combination of natural or artificial persons who without creating a partnership combine in the conduct of some particular business for profit. *Bennett v. Sinclair Refining Co.*, 144 Ohio St. 139 (1944). For purposes of this paper, it is sufficient to say that the Act will affect joint adventurers to the extent that the courts determine that the rules applicable to partnership apply to them. See *Geisenhoff v. Mabrey*, 58 Cal. App. 2d 481, 137 P. 2d 36 (1936).

<sup>46</sup> For characterization of joint stock company, see *Platt v. Colvin*, 50 Ohio St. 703, 36 N.E. 735 (1893); *MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIP* § 35 (2d ed. 1920).

<sup>47</sup> *E.g.*, N. Y. GEN. ASS'NS LAW § 4.

<sup>48</sup> *McFadden v. Luka*, 48 Ohio St. 513, 28 N.E. 874 (1891).

<sup>49</sup> *State Street Trust Co. v. Hall*, 311 Mass. 299, 41 N.E. 2d 30 (1942); *WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION* 327 *et seq.* (1929).

<sup>50</sup> The joint stock company variety of business trust is recognized in *Goubeaux v. Krickenger*, 126 Ohio St. 302, 185 N.E. 201 (1933). There was at one time serious question as to the validity of the true business or Massachusetts trust in the State of Ohio. See 1919 OPS. ATT'Y GEN. (Ohio)

A mining partnership results when tenants in common of mining property cooperate to develop the property for profit. It differs from a co-tenancy in the presence of agency and profit sharing. It differs from a general partnership in that there exists a tenancy in common in the mining property without the usual characteristics of partnership realty, the scope of implied agency is narrow and the shares of members are transferable. Though similar to a joint stock company it is limited to co-tenancies in mining or oil enterprises.<sup>51</sup>

The Act does not mention joint stock companies, business trusts or mining partnerships. In fact, many provisions of the Act are obviously incompatible with the characteristic of transferability of shares, a feature common to all three relationships.<sup>52</sup> Since these are specialized varieties of partnerships and since the Act makes no provision for them, it can be argued that enactment of the Act impliedly precludes their existence. The legal literature on the Act and the Commissioners' Notes are noncommittal on this issue. Nowhere is there a reference to these types of partnership. That in itself is persuasive that the Act was intended merely to deal with ordinary general partnerships, and not with these specialized types. This reasoning is supported by a Massachusetts decision rendered after the effective date of the Act in that state which holds that the Act does not apply to the sort of business trust wherein the members are liable as partners. This conclusion is applied to the extent at least that the Act is inconsistent with the contract terms of the business trust. Specifically, it was held in *State Street Trust Co. v. Hall*<sup>53</sup> that the provisions of the Act permitting a partner to dissolve the partnership even though the term of the partnership had not expired<sup>54</sup> did not apply to a business trust in the nature of a partnership. It would appear, therefore, that the enactment of the Act in Ohio would not prevent the continued existence and further creation of joint stock companies, mining partnerships, and business trusts wherein the members are liable as partners. The Act may well be applicable, however, to those forms of business to the extent that they are already subject to general partnership law under the common law. Their peculiar characteristics would not however be affected.

Ohio statutory law already provides for two specialized types

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No. 575, No. 597. The validity of that type of business organization seems now to be established. *State ex rel. Stuart v. Meyer*, 19 Ohio App. 136, 24 Ohio L. Rep. 273 (1925); 1931 OPS. ATT'Y GEN. (Ohio) No. 3438.

<sup>51</sup> For characteristics of mining partnership, see *Ervin v. Masterman*, 16 Ohio C.C. 62, 8 Ohio C.D. 516 (1898); MECHEM, *ELEMENTS OF THE LAW OF PARTNERSHIP* § 37 (2d ed. 1920).

<sup>52</sup> E. g., THE ACT §§ 25 (2) (d), 31, 32.

<sup>53</sup> 311 Mass. 299, 41 N.E. 2d 30 (1942).

<sup>54</sup> THE ACT § 31 (2).

of partnerships not included under the category of general partnerships covered by the Act. Each of these is purely a creature of statute and differs chiefly in the degree of personal liability to which their members are subjected. One of these, limited partnerships,<sup>55</sup> is expressly made subject to the Act, "except in so far as the statutes relating to such [limited] partnerships are inconsistent herewith."<sup>56</sup> The other, partnership associations,<sup>57</sup> would seem clearly excluded from operation of the Act by the reference to "any association formed under any other statute" as "not a partnership under this act."<sup>58</sup>

Another aspect of the effect of the Act on other forms of business organizations relates to the capacity of a corporation to be a partner. The term "person" under the Act includes "individuals, partnerships, corporations, and other associations."<sup>59</sup> As heretofore stated, the Act defines a partnership as an association of "two or more persons."<sup>60</sup> Therefore, as far as the Act is concerned there is nothing to prevent a corporation from being a member of a partnership. On the contrary, the authority is expressly provided. This does not necessarily mean, however, that as a matter of corporation law a corporation may become a partner for basically the capacity and authority of a corporation is a matter of corporation law. Under Ohio law, at least, since the Corporation Code of 1927 as amended,<sup>61</sup> corporations have all the authority of natural persons;<sup>62</sup> it would seem that a corporation might have the capacity to become a partner. This, however, would be true whether or not the Act is passed. While no case has been found denying a corporation the capacity to become a partner since the enactment of the Corporation Code, decisions prior to that time forbade corporations this capacity.<sup>63</sup>

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<sup>55</sup> OHIO GEN. CODE §§ 8036-8058 (1938).

<sup>56</sup> THE ACT § 6 (2).

<sup>57</sup> OHIO GEN. CODE §§ 8059-8078 (1938).

<sup>58</sup> THE ACT § 6 (2).

<sup>59</sup> THE ACT § 2.

<sup>60</sup> THE ACT § 6.

<sup>61</sup> OHIO GEN. CODE § 8623 (1938).

<sup>62</sup> OHIO GEN. CODE § 8623-8 (1938).

<sup>63</sup> *Merchants' National Bank v. Standard Wagon Co.*, 65 Ohio St. 559, 63 N.E. 1124 (1901), without opinion; *Geurinch v. Alcott*, 66 Ohio St. 94, 63 N.E. 714 (1902). One of the historic reasons used in arriving at this result is that to permit a corporation to become a partner would be in violation of statutes vesting the management of a corporation in the board of directors. *The Merchants' National Bank v. The Standard Wagon Company*, 6 Ohio N.P. 264, 9 Ohio Dec. (N.P.) 380, *aff'd*, 7 Ohio N.P. 539, 10 Ohio Dec. (N.P.) 81, *aff'd without opinion*, 65 Ohio St. 559, 63 N.E. 1124 (1901). Section 8623-55 of the Ohio General Code vests the management of Ohio corporations in the board of directors.

The Act might well be a fortifying link for a new chain of thought as to corporate capacity.<sup>64</sup>

#### AUTHORITY AND SCOPE

The essence of partnership is the mutual agency of all the partners to bind each other jointly on all contracts within the scope of the partnership business.<sup>65</sup> This authority, of course, falls into the conventional categories long recognized in the mother field of agency. Thus a partner not only has whatever express authority has been conferred upon him by his co-partners, but has in addition whatever authority may be implied as incidental to or as necessary for such authority or as may be implied from custom or usage.<sup>66</sup> An act of a partner for which authority cannot be found in the agreement or implied from any of these circumstances is not binding upon his co-partners; it is not, in short, a partnership act. None of these agency principles has been changed by the Act. In fact they are specifically incorporated in it.

This is due to the express recognition in the Act of the application of the law of agency,<sup>67</sup> and to the broad statement of agency powers set forth in four propositions: (1) that every partner is agent for the firm for all acts apparently in the usual course of firm business, unless no authority in fact exists to the knowledge of the third person;<sup>68</sup> (2) that an act not apparently for such purposes does not bind unless authorized;<sup>69</sup> (3) that certain acts are not binding unless authorized or performed by all the partners, except in case they have abandoned the business;<sup>70</sup> and (4) that no act in contravention of a restriction on authority shall bind the partnership to persons with knowledge of the restriction.<sup>71</sup>

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<sup>64</sup> See *Memphis Natural Gas Co. v. Pope*, 178 Tenn. 580, 586, 161 S.W. 2d 211, 213 (1941), *aff'd*, 315 U.S. 649 (1942), holding that a foreign natural gas company had such an interest in division of profits received by local power company, that the gas company was liable for state excise tax. In dicta the court stated that the language of the Act then in effect in Tennessee indicated that a corporation may be a partner.

<sup>65</sup> See text page 620 *supra*.

<sup>66</sup> *McGrath v. Cowen*, 57 Ohio St. 385, 49 N.E. 338 (1898); *Union Nat. Bank v. Wickham*, 18 Ohio C.C. 685, 6 Ohio C.D. 790 (1894).

<sup>67</sup> THE ACT § 4 (3).

<sup>68</sup> THE ACT § 9 (1).

<sup>69</sup> THE ACT § 9 (2).

<sup>70</sup> THE ACT § 9 (3).

<sup>71</sup> THE ACT § 9 (4). The agency parallel is found in the contrast between mere instructions and a limitation of authority. *Van Santvoord v. Smith*, 79 Minn. 316, 82 N.W. 642 (1900); *American Lead Pencil Co. v. Wolfe*, 30 Fla. 360, 11 So. 488 (1892); *Law v. Stokes*, 32 N.J.L. 249 (1867); *Hatch v. Taylor*, 10 N.H. 538 (1840).

With possibly two minor exceptions,<sup>72</sup> these principles either state or are consistent with present Ohio decisions. The Act's contribution here is in terms of clarity of expression rather than of novelty or variation of substance.

From the standpoint of tort liability of partners the Act likewise makes no change. The traditional joint and several liability of partners for torts committed by co-partners, employees, agents or servants, within the partnership scope is clearly reflected not only in the statement in Section 4 (3) that "The law of agency shall apply under this act," but again in Section 13, and more particularly in Section 15 (a) where the liability described in Section 13 is expressly stated to be joint and several.<sup>73</sup>

#### NATURE OF PARTNERSHIP LIABILITY

Thus as accurate an epitome of the present state of Ohio law as can be formulated is perhaps that the substantive contract liability of partners for obligations incurred within the scope of the partnership business, is still essentially joint in its nature, but that procedurally speaking, there have been superimposed by statute a series of attributes more akin to a joint and several relationship.

The mystic quality of "jointness" makes all joint obligors neces-

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<sup>72</sup> a. In *Wilcox v. Singletary*, Wright 420 (1833) the Ohio Supreme Court held that one partner has implied authority to submit a disputed partnership claim to arbitration. The Act denies this authority to less than all the partners in Section 9 (3) (e).

b. THE ACT § 9 (3) (a) and one Ohio case, *Holland & Pettitt v. Drake*, 29 Ohio St. 441 (1876) agree that less than all the partners have ordinarily no implied authority to make an assignment for the benefit of creditors. Another Ohio case, however, permits one partner to make an assignment for benefit of creditors if he can prove that the absent partner is inaccessible for consultation. *H. B. Clafflin Co. v. Evans*, 55 Ohio St. 183, 45 N.E. 3 (1896). Section 9 (3) of the Act permits less than all of the partners to make such an assignment where the non-assenting partner has abandoned the business. Literally, therefore, the Act appears to do away with the exception permitted by Ohio case law. This would be unfortunate in the rare case where a partner was inaccessible but had not abandoned the business. It is believed that under Sections 4 (3) and 5 of the Act a court could apply the existing Ohio exception.

<sup>73</sup> While it is clear from Sections 13, 14 and 15 (a) of the Act that partners are jointly and severally liable for the torts of one of the partners committed in the ordinary course of the business of the partnership, the Act is not explicit as to the nature of the liability of the partners when the tortious act is committed by an employee of the partnership in the ordinary course of business. Judicial construction of the Act in other states has viewed this liability of the partners as joint and several also, just as it was at common law. *Weaver v. Marcus*, 165 F. 2d 862 (C.C.A. 4th 1948); *Soberg v. Sanders*, 243 Mich. 429, 220 N.W. 781 (1928); Note, 34 VA. L. REV. 614 (1948).

sary parties in actions at law,<sup>74</sup> makes each liable for all with a secondary right of contribution,<sup>75</sup> and entails the concept of survivorship of obligation when sued upon on the law side of the court.<sup>76</sup> Equity's more lenient rules as to parties, plus its ready conversion of joint into joint and several obligations at death has long been another story.<sup>77</sup>

As has been seen, partnership torts have traditionally been joint and several,<sup>78</sup> and consequently by their very nature have provided plaintiffs both at law and in equity with alternative choice of parties.<sup>79</sup> Further, even though survivorship operates as to its joint aspect, that aspect of the obligation that is several becomes the liability of the deceased partner's estate.<sup>80</sup>

The statutory changes in Ohio have affected substantive rights to some small degree, procedural aspects markedly. The Probate Code has converted joint obligations into joint and several at death in actions at law as well as in equity.<sup>81</sup> While suits against partners in contract actions still require the initial joinder of all,<sup>82</sup> the statute now permits the action to proceed to judgment against less than all even though some have not been served with process.<sup>83</sup> These latter, if later served, may thereafter be made parties to that judgment.<sup>84</sup>

Levy of execution in the case of joint obligors at common law would lie against the property of any one of those served.<sup>85</sup> While this remains true in Ohio, a statute has added the right to levy upon the joint property as well even where all defendants are not indi-

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<sup>74</sup> *Choteau v. Raitt*, 20 Ohio 132, 144 (1851).

<sup>75</sup> *Gaylord, Son & Co. v. Imhoff & Co.*, 26 Ohio St. 317 (1875).

<sup>76</sup> *Beach v. Hayward*, 10 Ohio 455 (1841). See *Weil v. Guerin*, 42 Ohio St. 299 (1884).

<sup>77</sup> See *Burgoyne v. Ohio Life Ins. & Trust Co.*, 5 Ohio St. 586, 587 (1855).

<sup>78</sup> *Big Store Co. v. Levine*, 22 Ohio N.P. (N.S.) 469 (1920).

<sup>79</sup> All partners are not necessary parties but any one or more of the members of a partnership may be sued for a firm tort. *Big Store Co. v. Levine*, 22 Ohio N.P. (N.S.) 469 (1920).

<sup>80</sup> See *Reeve v. Wheeler*, 11 Ohio L. Rep. 510 (C.P. 1910).

<sup>81</sup> OHIO GEN. CODE § 10509-139 (1938): Applied or discussed in *Burgoyne v. Ohio Life Ins. & Trust Co.*, 5 Ohio St. 586 (1855); *Weil v. Guerin*, 42 Ohio St. 299 (1884); *Simon v. Rudner*, 43 Ohio App. 38, 182 N.E. 650 (1932).

<sup>82</sup> OHIO GEN. CODE § 11256 (1938). *Bazell v. Belcher*, 31 Ohio St. 572 (1877); *Ohio Well Supply Co. v. Scott*, 11 Ohio N.P. (N.S.) 123 (1910).

<sup>83</sup> OHIO GEN. CODE §§ 11299, 11583 (1938).

<sup>84</sup> OHIO GEN. CODE § 11644 (1938).

<sup>85</sup> See *Hawkins v. Lasley*, 40 Ohio St. 37, 38 (1883).

vidually served.<sup>86</sup> Further, levy will reach the separate property of any obligor later served and made a party to the judgment.<sup>87</sup>

In case suit against less than all joint obligors results in judgment, it is the common-law view that the original joint cause of action is merged in the judgment and all unserved obligors are thereby released.<sup>88</sup> This too has been modified in Ohio, in that even after judgment action may still be brought against parties not served, at least until the cause of action has been extinguished by satisfaction.<sup>89</sup>

Finally, while the common-law doctrine that a release of one joint or joint and several obligor releases all<sup>90</sup> still obtains during the active life of the partnership, the legislature has now provided that compromise of contract obligations after dissolution constitutes a discharge only of the party negotiating it, leaving the obligation of his co-partners still intact.<sup>91</sup> Tort obligations are not dealt with in this statute.<sup>92</sup>

The Uniform Act leaves this background undisturbed. The substantive nature of joint liability in contract, joint and several in tort, is reaffirmed.<sup>93</sup> As under modern Ohio statutes, the estate of a deceased partner is made liable for partnership debts.<sup>94</sup> No provision is made in the Act as to parties, judgment or executions, in actions on joint obligations.<sup>95</sup> The Act thus affirms certain aspects of Ohio law and makes no reference to others. If adopted, it would accomplish no change.

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<sup>86</sup> OHIO GEN. CODE §10418 (1938).

<sup>87</sup> OHIO GEN. CODE §11644 (1938).

<sup>88</sup> *Sloo v. Lea*, 18 Ohio 279 (1849); *National LaFayette Bank v. Scott*, 13 Ohio Dec. (N.P.) 600 (1903).

<sup>89</sup> *Stone v. Whittaker*, 61 Ohio St. 194, 55 N.E. 614 (1899); *Yoho v. McGovern*, 42 Ohio St. 11 (1884).

<sup>90</sup> *Westcott v. Price, Wright* 220 (Ohio 1833).

<sup>91</sup> OHIO GEN. CODE § 8079 (1938). This section is limited to compromises effectual after dissolution. Ohio General Code Section 8084 makes Section 8079 applicable to all joint debtors. Even though partners are joint debtors the courts have held this section inapplicable to compromises effected before dissolution. *Robinson v. Bergholz*, 4 Ohio Dec. Rep. 103 (C.P. 1878); see *Walsh v. Miller*, 51 Ohio St. 462, 485 (1894). But see *Wheeling Corrugating Co. v. Veach*, 7 Ohio N.P. 156, 157 (1897).

<sup>92</sup> *Moore v. Pittsburgh C. C. & St. L. Ry.*, 7 Ohio N.P. (N.S.) 368 (1908); *Heyndricks v. Faudel*, 16 Ohio C.C. (N.S.) 26, 37 Ohio C.C. 293 (1908); *Gilbert v. Timms*, 7 Ohio C.C. (N.S.) 253, 28 Ohio C.C. 107 (1905). *Contra*: *Jenkins v. Pachoud & Co.*, 18 Ohio Dec. (N.P.) 321 (1907). Cf. *Spencer v. Spencer*, 53 Ohio St. 682 (1895) (no opinion) (tort claim had been reduced to judgment before compromise effected).

<sup>93</sup> THE ACT § 15.

<sup>94</sup> THE ACT § 36 (4).

<sup>95</sup> The Commissioners' note to Section 15 (b) of the Act states that the purpose of the Act is to make uniform the substantive law of partnership, and therefore where a state such as Ohio has already procedurally declared the liability to be joint and several, it would not be out of line with the

## NATURE OF PARTNERSHIP PROPERTY; PERSONALTY

Partnership assets at common law consist of all the partnership property, personal or real, tangible or intangible, whether acquired by way of capital or advances made to the firm by the members, or acquired with partnership funds.<sup>96</sup> The principal test used to determine whether property is partnership property is the intent of the partners.<sup>97</sup> In the absence of evidence of expressed intent, the courts will infer an intent from the attending circumstances, such as the source of the property, the purpose for which it was acquired, the manner in which it was acquired and the method of dealing with it.<sup>98</sup> In the case of personal property, conveyances can be taken and conveyed in the firm name, title being viewed nevertheless as in the partners themselves.<sup>99</sup> None of the partners has an exclusive right to such property. All have an equal right to possess it for purposes of the business of the partnership.<sup>100</sup> No one partner can transfer legal title to any specific personal property save for partnership purposes.<sup>101</sup>

The courts have agreed that the co-ownership of personal property by partners is neither a tenancy in common nor strictly a joint tenancy. The right of survivorship exists but only to the extent of payment of partnership obligations.<sup>102</sup> Perhaps the most apt description, as some writers have said, is "tenancy in partnership."<sup>103</sup> From all of this it is apparent that each individual partner's interest in the partnership property is a share in the proceeds of the property after the payment of partnership debts.<sup>104</sup>

The Act makes no changes with respect to partnership assets, or the nature of each partner's interest in partnership personal property. It provides in Section 8 (1) that "all property originally

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principle of uniformity to make an appropriate change in Section 15 (b). The authors feel that such a change is unnecessary. The enactment of Section 15 (b) stating that, substantively speaking, partnership contractual liability is joint would not repeal the Ohio legislation discussed in the text since that legislation is merely procedural.

<sup>96</sup> MEACHEM, ELEMENTS OF THE LAW OF PARTNERSHIP § 138 (2d ed. 1920).

<sup>97</sup> See *Rammelsberg v. Mitchell*, 29 Ohio St. 22, 47 (1875).

<sup>98</sup> MEACHEM, ELEMENTS OF THE LAW OF PARTNERSHIP §§ 139-141 (2d ed. 1920).

<sup>99</sup> *Id.* at §§ 150-152.

<sup>100</sup> *Nixon v. Nash*, 12 Ohio St. 647 (1861).

<sup>101</sup> See *Page v. Thomas*, 43 Ohio St. 38, 43, 1 N.E. 79, 82 (1885).

<sup>102</sup> MEACHEM, ELEMENTS OF THE LAW OF PARTNERSHIP § 143 (2d ed. 1920).

<sup>103</sup> *Id.* at § 144.

<sup>104</sup> *Ludlow v. Cooper*, 4 Ohio St. 1 (1854); *Place v. Sweetzer*, 16 Ohio 142 (1847); *Fisher v. Lang*, 10 Ohio Dec. Rep. 178 (Sup. Ct. 1887); see *Page v. Thomas*, 43 Ohio St. 38, 43, 1 N.E. 79, 82 (1885); *Rodgers v. Meranda*, 7 Ohio St. 179, 181, 182 (1857); *Horner v. Meyers*, 29 Ohio L. Bull. 403 (Super. Ct. 1898).



brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property," and in Section 8 (2) that "unless the contrary intention appears, property acquired with partnership funds is partnership property." Under this language, as at common law, the criterion whether a particular item of property is partnership property is intent of the partners.<sup>105</sup> Section 25 provides that each partner, subject to the provisions of the Act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes, but no right independent thereof; that the separate right of each partner is not assignable by the separate partner; that it is not subject to attachment or execution of his separate creditors; and that on the death of a partner his right vests in the surviving partner (or partners) but that such survivor has no right to possess the partnership property for any but partnership purposes. Section 26 provides that "a partner's interest in the partnership is his share of the profits and surplus, and the same is personal property." The Act describes the interests of each partner in specific partnership property as a "tenancy in partnership."<sup>106</sup> This is clear recognition of an ownership but of a type distinct from either tenancy in common or joint tenancy.

Each partner has a right to receive the balance of firm assets in cash after firm debts are paid.<sup>107</sup> The partners are therefore not entitled to partition of property remaining in kind after firm creditors have been paid.<sup>108</sup>

#### THE REAL PROPERTY PROBLEM

It is a long-standing principle that legal title to real property must vest in a legal person.<sup>109</sup> A partnership not being a legal person at common law can not therefore receive<sup>110</sup> or convey<sup>111</sup> real

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<sup>105</sup> *State Bank v. Bagley Bros.*, 44 Wyo. 244, 11 P. 2d 572 (1932), *re-hearing denied*, 44 Wyo. 456, 13 P. 2d 564 (1932); *Block v. Schmidt*, 296 Mich. 310, 296 N.W. 698 (1941); *Quinn v. Leidinger*, 107 N.J. Eq. 188, 152 Atl. 249 (Ch. 1930), *aff'd*, 110 N.J. Eq. 663, 160 Atl. 537 (Ct. Err. & App. 1932).

<sup>106</sup> THE ACT § 25.

<sup>107</sup> THE ACT § 38.

<sup>108</sup> See *Dow v. Beals*, 149 Misc. 631, 632, 268 N.Y. Supp. 425, 427 (Sup. Ct. 1933); *Higgins v. Chicago Title & Trust Co.*, 312 Ill. 11, 25, 143 N.E. 482, 487 (1924); *Swarthout v. Gentry*, 62 Calif. App. 2d 68, 144 P. 2d 38 (1944), wherein the court without reference to the Act stated it would permit a distribution in kind if all partnership debts were paid and the partition would not be to the detriment of either partner.

<sup>109</sup> 2 TIFFANY, REAL PROPERTY § 443 (3d ed. 1939).

<sup>110</sup> *Rammelsberg v. Mitchell*, 29 Ohio St. 22 (1875); *Bank v. Johnson*, 47 Ohio St. 306, 24 N.E. 503 (1889); *Teare v. Cain*, 7 Ohio C.C. 375 (1893).

<sup>111</sup> *Stambaugh v. Smith*, 23 Ohio St. 584 (1873).

property in its firm name. If on the other hand legal title is taken in the individual names of several or all the partners, they hold the title, as tenants in common,<sup>112</sup> and the legal interest of each will pass to his heirs.<sup>113</sup> In addition, if a deceased partner leaves a surviving spouse, the latter is entitled to common law curtesy or dower, or today statutory dower in legal estate.<sup>114</sup> These principles are all too logical products of a combination of the aggregate theory of partnership and the real property concept of legal title, but they have given rise to a variety of questions as to locus of title and have rendered the settlement of partnership affairs upon dissolution exceedingly difficult. However, as partnership use of, and dealings in, real estate have become more frequent, courts of equity have evolved a set of quite different criteria for the determination of equitable interests.<sup>115</sup> These are, in a sense, superimposed on the framework of legal interests. But to accomplish this readjustment, the equity court must first determine whether the property is what it terms "partnership real estate."

Fundamentally this is said to be a matter of intent,<sup>116</sup> but, as has been seen, in the absence of express statements, certain indicia of this intent are seized upon as adequate to establish it. Although separate ownership of the property prior to formation of the partnership is presumed to continue,<sup>117</sup> land that is later acquired and paid for with firm funds is viewed as partnership real estate.<sup>118</sup> Equity treats this property as having the incidents of personalty and describes it as "converted."<sup>119</sup>

At this point Ohio courts have introduced marked confusion by the assertion that this conversion may be of two sorts. Thus, land bought with firm funds but not actually needed for firm purposes or used in the firm business, is described as converted in equity *sub modo*;<sup>120</sup> while property not only bought with firm funds but both needed and used in the firm business is regarded as converted out and out.<sup>121</sup> While the courts of equity have viewed this property

<sup>112</sup> *Greene v. Graham*, 5 Ohio 264 (1831). See *Miller v. Proctor*, 20 Ohio St. 442, 445 (1870).

<sup>113</sup> *Rammelsberg v. Mitchell*, 29 Ohio St. 22 (1875); *Greene v. Graham*, *supra* note 112.

<sup>114</sup> 2 TIFFANY, REAL PROPERTY § 504 (3d ed. 1939). Cf. *Greene v. Greene*, 1 Ohio 535 (1824); *Sumner v. Hampson*, 8 Ohio 328 (1838).

<sup>115</sup> See *Sumner v. Hampson*, *supra* note 114, at 365.

<sup>116</sup> *Rammelsberg v. Mitchell*, 29 Ohio St. 22 (1875).

<sup>117</sup> *Jones v. De Camp*, 2 Ohio N.P. (N.S.) 133 (1903), *aff'd without opinion*, 72 Ohio St. 616, 76 N.E. 1123 (1905).

<sup>118</sup> *Rammelsberg v. Mitchell*, 29 Ohio St. 22 (1875).

<sup>119</sup> 2 TIFFANY, REAL PROPERTY § 447 (3d ed. 1939).

<sup>120</sup> *Rammelsberg v. Mitchell*, 29 Ohio St. 22 (1875).

<sup>121</sup> *Rammelsberg v. Mitchell*, *supra* note 120. The courts of most American jurisdictions do not make a distinction between conversion *sub modo* or *pro tanto*, and conversion out and out. They ordinarily regard all

as having the incidents of personalty in both instances for the duration of the conversion, they have considered the period during which this conversion is effective as of different durations in the two cases. Thus, when the property is no longer needed to satisfy the claims of firm creditors in the case of *sub modo* conversion, its character as personalty ceases;<sup>122</sup> whereas in the case of out-and-out conversion this characteristic endures even after firm debts are paid.<sup>123</sup> In either event, during the period that the real estate still retains its character of personalty in equity, the equitable ownership is distributed as personalty on death, and is free from dower.<sup>124</sup>

It is in relation to this confusing problem of partnership real estate that the Act makes one of its major contributions. This is accomplished by the sum total effect of provisions defining partnership property, the mode of its conveyance and the nature of each partner's interest in firm real estate.

Section 8 (3) of the Act provides that "any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name."<sup>125</sup> This section is permissive rather than mandatory with respect to acquisition of real property by the partnership. It avoids, however, the necessity of taking title to partnership property in the names of the several partners<sup>126</sup> and in consequence also avoids the problems which have arisen under the common law as to the location of legal title when real property was conveyed to the partnership in its firm name. To the extent utilized, it should avoid any question as to whether the property is firm property. Certainly where real property is taken in the firm name, it will be considered partnership property in the absence of compelling proof to the contrary.<sup>127</sup>

The fact that property is not taken in the firm name, however, does not indicate that the real estate is not partnership property. Section 10 (3) states that title to real estate may also be taken in

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partnership real estate as being converted *sub modo* only. 2 TIFFANY, REAL PROPERTY § 447 (3d ed. 1939). MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIP § 163 (2d ed. 1920).

<sup>122</sup> Rammelsberg v. Mitchell, *supra* note 120.

<sup>123</sup> Rammelsberg v. Mitchell, *supra* note 120; Ludlow v. Cooper, 4 Ohio St. 1 (1854); Fisher v. Lang, 10 Ohio Dec. Rep. 178 (Super. Ct. 1887).

<sup>124</sup> Rammelsberg v. Mitchell, *supra* note 120; Greene v. Greene, 1 Ohio 535 (1824); Sumner v. Hampson, 8 Ohio 328 (1838).

<sup>125</sup> Section 8 (4) of the Act provides that the entire estate of the grantor passes when a conveyance of real property is made to a partnership in the partnership name. This section is probably unnecessary. Ohio General Code Section 8510-1 provides that no words of inheritance are needed to pass a fee simple estate.

<sup>126</sup> See Scheurman v. Farbman, 245 Mich. 688, 224 N.W. 604 (1929); Windom Nat. Bank v. Klein, 191 Minn. 447, 254 N.W. 602 (1934).

<sup>127</sup> See Windom Nat. Bank v. Klein, *supra* note 126.

the name of one or more of the partners.<sup>128</sup> Moreover, the definition of partnership property does not, of course, require the taking of title in the firm name. As a matter of fact, this definition as contained in Sections 8 (1) and (2) appears broader than at common law. Under the Act partnership property includes not only "property brought into the partnership stock originally" but also "property acquired by purchase or otherwise, on account of the partnership", a phrase more comprehensive than the usual common-law requirement of purchase with partnership funds.

Save for the sections dealing with conveyances,<sup>129</sup> the Act makes no distinction between real and personal property. As has already been noted, it provides that each partner has only a "tenancy in partnership" in specific partnership property, whether personal or real.<sup>130</sup> The nature of this tenancy is such that the partner has only an equal right with his partners to possess the specific partnership property, his right is not assignable, is not subject to attachment or execution, and on his death it vests in the surviving partner and is not subject to dower.<sup>131</sup>

The Act also provides that a partner's interest in the partnership is his share of the profits and surplus,<sup>132</sup> and this, of course, is in the nature of personal property. Upon dissolution, each partner may have the partnership property applied to discharge its liabilities, and the surplus applied in cash to pay the net amount owing to each partner.<sup>133</sup> Thus, to use the judicial terminology, the Act effects a conversion of real property at law comparable to that now restricted to courts of equity. Expressed differently, for partnership purposes, all real property of the partnership whether necessary to, and used in, the partnership or not, is considered personalty,—the conversion is therefore out-and-out. The conversion is no longer restricted to proceedings in equity. By virtue of the Act, it is equally effective at law.<sup>134</sup>

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<sup>128</sup> Some illustrative cases under the Act holding property taken in individual names of partners to be partnership property are: *Bratton v. Morris*, 54 Idaho 743, 37 P. 2d 1097 (1934); *Shanahan v. Olmsted County Bank & Trust Co.*, 217 Minn. 454, 14 N.W. 2d 433 (1944); *Matter of Allen*, 148 Misc. 488, 266 N.Y. Supp. 277 (Super. Ct. 1933).

<sup>129</sup> THE ACT § 10.

<sup>130</sup> THE ACT § 25.

<sup>131</sup> THE ACT § 25.

<sup>132</sup> THE ACT § 26.

<sup>133</sup> THE ACT § 38.

<sup>134</sup> a. *Wharf v. Wharf*, 306 Ill. 79, 137 N.E. 446 (1922); *Altman v. Altman*, 271 App. Div. 884, 67 N.Y.S. 2d 119 (1946); *In re Dumarest's Estate*, 146 Misc. 442, 262 N.Y. Supp. 450 (Surr. Ct. 1933). See *Smith v. Guy*, 23 Tenn. App. 352, 144 S.W. 2d 702 (1940); *cert. denied* by Tenn. Sup. Ct. Oct. 5, 1940.

b. If the Act is to be enacted in Ohio a slight change should be made in Section 25 (2) (e). That section states that "A partner's right in specific

While dealing with real property, it is perhaps appropriate to discuss one problem of conveyancing under the Act that has caused concern to some commentators.<sup>135</sup> As previously mentioned, the Act provides that real property acquired by the partnership in the firm name may be conveyed in the firm name.<sup>136</sup> Any partner acting within the scope of his authority as a partner may convey the title to the property by a conveyance thus executed.<sup>137</sup> If the conveyance is not within the scope of the conveying partner's authority, the partnership may recover the real estate so conveyed unless it has in the meantime been conveyed by the grantee to a holder for value, without the knowledge that the partner in making the conveyance has exceeded his authority.<sup>138</sup> Two queries arise. How will the title examiner know that the partner who executed the conveyance was in fact a partner or had authority to convey? Further, won't the holder for value from the partnership grantor be placed upon inquiry as to the authority of the executing partner, since a check of the vendor's title will disclose a partnership in the chain of title? Mr. Lewis, the draftsman of the Act, has given his answer to both queries. As to the first, he suggests that the acknowledgment by the executing partner will undoubtedly state that he is a partner and that he is authorized to convey the property.<sup>139</sup> This he points out is all that appears as to the authority of a corporation to convey real estate. If the grantee wishes to relieve all uncertainty, he may get a certified statement from the other partner, just as a person taking title from a corporation may make certain by obtaining a certified copy of a resolution of the board of directors authorizing the conveyance and of the appointment of the officers executing the con-

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partnership property is not subject to dower, curtesy, or allowances to widows, heirs or next of kin." "Curtesy" has been abolished in Ohio. OHIO GEN. CODE § 10502-8 (1938). Dower, unless the property has been conveyed during coverture without joinder, expires at death. OHIO GEN. CODE § 10502-1 (1938). At the death of the spouse owning the legal estate, the surviving spouse is entitled to a statutory inheritance in lieu of dower and this may be elected even against the will. OHIO GEN. CODE §§ 10502-1, 10503-4, 10504-55, 10504-61 (1938). Accordingly, for adoption in Ohio Section 25 (2) (e) should be amended to read "A partner's right in specific partnership property is not subject to dower, statutory interest of a surviving spouse, of heirs or of next of kin, or allowances to a surviving spouse or minor children."

<sup>135</sup> Crane, *The Uniform Partnership Act, A Criticism*, 28 HARV. L. REV. 762, 779 (1915); Day, *Uniform Partnership Act with Oregon Notes*, 22 ORE. L. REV. 207 (1943). But see Williams, *The Uniform Partnership Act Comes to Nebraska*, 22 NEB. L. REV. 215, 221 (1943).

<sup>136</sup> THE ACT § 8 (3).

<sup>137</sup> THE ACT § 10 (1).

<sup>138</sup> THE ACT § 10 (1).

<sup>139</sup> Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 291, 298 (1916).

veyance as an officer. As to the second query, the Act by clear implication provides that mere knowledge that a partnership once owned the property is not enough to put a remote grantee on notice concerning the executing partner's authority.<sup>140</sup> This is the whole import of the language "... or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority."<sup>141</sup> The knowledge in question clearly relates to the excess of authority, not merely to the existence of a partnership. The use of the word "knowledge" instead of the word "notice" fortifies this conclusion in view of the definition of these two terms as contained in the Act.<sup>142</sup>

#### RIGHT OF SEPARATE CREDITOR OF AN INDIVIDUAL PARTNER TO ATTACH PARTNERSHIP INTERESTS—THE CHARGING ORDER

The familiar principle that a creditor may reach his debtor's assets and apply them to the satisfaction of his debt, has a special significance when the debtor is a partner and among his assets is his interest in the partnership. As has been seen, this interest is a right to a distributive share in such residue of partnership assets as may not be needed for the payment of firm obligations; during the active continuance of the partnership this is viewed in the case of personalty, as a nonexclusive co-tenancy with the right of survivorship; in the case of real estate, as a legal estate consistent with the language of the deed, subject to an equitable estate as formulated by the doctrine of conversion as previously stated.<sup>143</sup>

The ordinary processes of a law court are hardly suited to the appropriation of this sort of an interest to the claims of a creditor. Levy of an attachment or execution involves the taking of possession, and to take possession of an intangible right to an undetermined distributive share poses a problem of no mean difficulty to the practical-minded arm of the law.

This problem has already been encountered in Ohio with the result that it has been held, for lack of better solution, that the separate creditor of a partner may secure a levy upon partnership assets with a view to the sale of so much of the debtor's residuary share therein as may be needed to satisfy the debt.<sup>144</sup> The purchaser

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<sup>140</sup> Day, *Uniform Partnership Act with Oregon Notes*, 22 ORE. L. REV. 207, 210 (1943). In footnote 12 on page 210, Mr. Day set forth an excerpt of a letter received from Mr. Lewis commenting on this problem.

<sup>141</sup> THE ACT § 10 (1).

<sup>142</sup> THE ACT § 3.

<sup>143</sup> See text pp. 631-635 *supra*.

<sup>144</sup> *Nixon v. Nash*, 12 Ohio St. 647 (1861); *Sutcliffe v. Dohrman*, 18 Ohio 181 (1849); *Place v. Sweetzer*, 16 Ohio 142 (1847).

becomes a tenant in common with the partners to the extent of his interest but with no right to use the property nor himself to become a partner.<sup>145</sup> In the interim, the officer's possession has interrupted the firm business and the nature of the interest offered for sale is too uncertain to bring an adequate price.<sup>146</sup>

This wholly impracticable situation has been partially relieved by assistance from the equity side by means of an injunction of the sale pending the determination of the nature and value of the debtor-partner's interest through an accounting.<sup>147</sup> This is obtainable at the behest of any of the partners, including the debtor, or of the creditor himself.<sup>148</sup> At best this procedure is unwieldy for the creditor and disturbing to firm business. At worst, it is readily susceptible to abuse in forcing solvent partners to pay the debts of an insolvent co-partner as the price of avoiding disruption of the business.

A separate creditor's effort to reach his debtor-partner's interest in partnership real estate is rendered slightly less complex by the fact that legal title may in fact be in the debtor and thus subject initially to the acquisition of a legal lien. But here again he is faced by the principle that such title is held in trust for the payment of firm debts, and since it is but a right to a distributive share after firm debts are paid, his lien in the last analysis is subordinate to the claims, and even the after-acquired liens, of firm creditors.<sup>149</sup>

The Act would drastically revise the procedure available to a separate creditor in satisfying his claim against a debtor partner out of his debtor's interest in the partnership. It has already been noted that the Act creates a tenancy in partnership with incidents comparable to those which courts of equity have superimposed on legal estates; it makes these incidents legal incidents.<sup>150</sup> In fact, it expressly provides that a partner's right in specific partnership property is not subject to attachment or execution at the instigation of a separate creditor of an individual partner.<sup>151</sup> The only creditors who can reach partnership property in these ways are firm creditors, —those having claims arising from a contract within the scope of the partnership.<sup>152</sup> Thus under the Act the separate creditor can no longer disrupt the partnership business.

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<sup>145</sup> *Nixon v. Nash*, *supra* note 144.

<sup>146</sup> *Nixon v. Nash*, *supra* note 144.

<sup>147</sup> *Place v. Sweetzer*, 16 Ohio 142 (1847).

<sup>148</sup> *Nixon v. Nash*, 12 Ohio St. 647 (1861); *Place v. Sweetzer*, 16 Ohio 142 (1847).

<sup>149</sup> *Page v. Thomas*, 43 Ohio St. 38, 1 N.E. 79 (1885).

<sup>150</sup> THE ACT § 25.

<sup>151</sup> THE ACT § 25 (2) (c).

<sup>152</sup> THE ACT § 25 (2) (c).

However, the Act provides the separate creditor, in case he has reduced his claim to judgment, with an alternative procedure commonly known as the "charging order." He may apply to any competent court, including the court which gave him his judgment, and the court is empowered in its discretion to charge the interest of the debtor-partner in the partnership with payment of the unsatisfied amount of judgment debt with interest.<sup>153</sup> Further the court is given authority to appoint a receiver of the debtor-partner's share of the profits or any other money due the debtor-partner from the partnership "and make all other orders, directions, accounts and inquiries which the debtor-partner might have made, or which the circumstances of the case may require."<sup>154</sup>

This procedure at once avoids interference with the existing partnership and provides a practical method by which the separate creditor may collect his debt from the individual partner. This is undoubtedly a highly significant contribution of the Act.

The provisions for a charging order unfortunately appear to leave two rather important questions unanswered. May the separate creditor cause the individual partner's interest to be sold or must he content himself with collecting the profits and other moneys due his debtor from the partnership as the partnership makes distribution? Second, does a sale, if one is permitted, to a person other than a partner have the effect of dissolving the partnership? If the answer to the first question is that the individual partner's interest may not be sold under any circumstances, the remaining partners have the power to postpone a separate creditor by refusing to make a distribution until ordered to do so by the court. If a sale to a stranger may be permitted and the effect is to dissolve the partnership, much of the value of this section would be lost.

By clear inference the language empowers the court to direct a sale, since the express authority to co-partners to purchase would otherwise be meaningless. That the Act also authorizes the appointment of a receiver is no necessary contradiction, for it may well be left to the court's discretion to determine which course is the wiser. The last phrase, granting power to issue any orders "which the circumstances of the case may require" would seem clear confirmation of this broad confidence.<sup>155</sup>

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<sup>153</sup> THE ACT § 28.

<sup>154</sup> THE ACT § 28.

<sup>155</sup> There seem to be but few cases concerning the charging order and of these only two, one an English case and one a lower court case in Pennsylvania, throw any light on the problem under discussion. In *Brown, Janson & Co. v. A. Hutchinson & Co.*, 1 Q.B.D. 737 (1895), the Court of Appeals indicates that the only effect of a charging order and appointment of a receiver in the absence of a further order of the court is to enjoin the remaining partners from paying any of the proceeds of the partnership to



The language of Section 28 (2) of the Act expressly states that there shall be no dissolution where a partner purchases from his separate property or one or more partners do so from firm property "with the consent of all the partners whose interests are not so charged or sold." It will be noted that no reference is made to a purchase by a stranger or to whether a sale to him will dissolve the firm.<sup>156</sup> No answer then, will be found here, but this is not the only section to consider.

Perhaps the clearest reference is in Section 32 (2) providing that on application of a purchaser of a partner's interest under Section 27 or 28 (the latter being the section in question) the court may with certain qualifications, dissolve the partnership, a power obviously unnecessary if dissolution had already been accomplished by the sale. Moreover, Section 27 states that a voluntary conveyance of a partner's interest does not dissolve, and the enumeration in Section 31 of acts and events that will cause dissolution does not include a conveyance, either voluntary or involuntary. The sum total of these provisions is persuasive, therefore, that the debtor partner's interest may be purchased by any person without thereby causing a dissolution and that the partners themselves may purchase in either of the two ways indicated by paragraphs (a) and (b), of Section 28 (2). This interpretation relieves the court of the responsibility of bringing about a dissolution by the order of sale, although it is true that if the partnership be at will, as many are, the purchaser may return to apply for a dissolution subsequently as a matter of right under Section 32 (2). The situation in this one contingency would then be reminiscent of the present common-law predicament where a separate creditor, as already noted, can seriously disrupt the partnership business.<sup>157</sup>

There are two further matters of some importance in connection with the charging order. First it is not necessary to issue a writ

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the debtor-partner. In *Frankil v. Frankil*, 15 Pa. D. & C. 103 (1931), the court in connection with a charging order directed the sheriff to sell the debtor-partner's interest in the firm. See Note, 10 Wis. L. Rev. 120 (1934). If full effect is to be given to the apparent purpose of Section 28, the courts should not order a sale save under exceptional circumstances such as where it appears the remaining partners deliberately withheld the declaration of profits to hinder the debtor-partner's creditor. Otherwise the remaining partners might find themselves in a position similar to that in which the common law placed them.

<sup>156</sup> Under the terms of Section 31 (1) (c) it would seem that if a charging order is issued against the interest in the partnership of one partner, the remaining partners may then dissolve the firm.

<sup>157</sup> This further fortifies the conclusion that a sale of the debtor-partner's interest in the partnership should only be ordered in connection with a charging order where it appears that the sale will not disrupt the business of the remaining partners or where the collection of the separate creditor's judgment would be indefinitely postponed.

of execution before applying for a charging order.<sup>158</sup> Also, the debtor-partner is entitled to whatever personal exemption he has under local law.<sup>159</sup> This is in contrast with levy of an attachment of or execution upon specific partnership property by a firm creditor, in which case under the Act none of the partners may claim any right under the homestead or exemption laws.<sup>160</sup> The same distinction exists at common law.<sup>161</sup>

#### CHANGE IN PARTNERSHIP PERSONNEL

At common law the partnership relation has always been peculiarly unstable. In fact, the risk of easy, un contemplated dissolution has been second only to the risk of joint liability on partnership obligations. Thus, any addition or subtraction in the number of members of a general partnership, whether *inter vivos* or by death, has uniformly been viewed as accomplishing instant dissolution, quite regardless of any evidence of intent to the contrary.<sup>162</sup>

The explanation for this has ordinarily been two-fold: first, that since the relationship is fiduciary it depends intimately on the personal choice of colleagues, that no partner can be deemed to have consented to relationships in any respect different from those he initially undertook, for to force upon him either more or fewer co-partners with the consequent inevitable diversity of qualification and personality, is to expose him to risks never contemplated; and, second, that from the standpoint of legal concepts, and in the absence of a legal entity, a contract relation between one set of joint obligors is inevitably a contract different from that between another such set; that in the very nature of things this is true regardless of whether, in fact, consent has been given so clearly as to obviate the first explanation in terms of choice of one's associates.<sup>163</sup>

In consequence, the retirement of a partner, assuming it to be effectuated as to creditors by adequate notice, terminates all author-

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<sup>158</sup> *Scott v. Platt*, 177 Ore. 515, 163 P. 2d 293 (1945); *rehearing denied*, 177 Ore. 515, 164 P. 2d 255. See *Rader v. Goldoff*, 223 App. Div. 455, 228 N.Y. Supp. 453 (1928); *Sherwood v. Jackson*, 121 Cal. App. 354, 8 P. 2d 943 (1932). If execution is issued it may create rights even though no seizure of specific partnership property may be made pursuant thereto. *First National Bank of Charleston v. White*, 268 Ill. App. 414 (1932).

<sup>159</sup> THE ACT § 28 (3).

<sup>160</sup> THE ACT § 25 (2) (c).

<sup>161</sup> *Gaylord v. Imhoff*, 26 Ohio St. 317 (1875); *Aultman, Miller & Co. v. Wilson*, 55 Ohio St. 138, 44 N. E. 1092 (1896). *But cf. Mortley v. Flanagan*, 38 Ohio St. 401 (1882).

<sup>162</sup> *Snyder Mfg. Co. v. Snyder*, 54 Ohio St. 86, 43 N.E. 325 (1896).

<sup>163</sup> MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIP § 57 (2d ed. 1920).

ity of remaining partners to bind him,<sup>164</sup> although, of course, it does not relieve him from joint obligations incurred prior to retirement.<sup>165</sup> Conversely, advent of a new incoming member creates an authority to impose joint liability as of the time of admission but, in the absence of consent, exposes him to none of the firm obligations incurred prior thereto.<sup>166</sup> In theory, in both instances the old firm is liquidated. In practice, however, the same business is frequently continued without interruption. Where this happens, creditors of the old firm sometimes try to reach the assets of the new firm in order to satisfy their claims. While it is clear at common law that they cannot reach new assets which the new firm has subsequently acquired, the cases are not clear as to the ability of the old firm creditors to reach such assets of the old firm as may be retained by the new one.<sup>167</sup> This is undoubtedly attributable to the fact that in many instances determination of the question has turned on one of two other factors: either the remaining partner or the new partner has assumed the debts of the old firm (or the courts have inferred that they have);<sup>168</sup> or the courts have found that a transfer from

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<sup>164</sup> *Palmer v. Dodge*, 4 Ohio St. 21 (1854); *Gardner v. Conn*, 34 Ohio St. 187 (1877); *Feigley v. Whitaker*, 22 Ohio St. 606 (1872).

<sup>165</sup> *Reed v. Ramey*, 82 Ohio App. 171 (1948). See *Horseley v. Heath*, 5 Ohio 353, 356, 357 (1832).

<sup>166</sup> See *Andres v. Morgan*, 62 Ohio St. 236, 56 N.E. 875 (1900).

<sup>167</sup> It can be contended that since by definition a partner's interest in firm property is essentially residuary—merely a right to what is left after payment of firm creditors therefrom—the incoming partner can acquire only this residuary right and as a consequence has no claim to such assets of the old firm as may be acquired by the new one until after the creditors of the old firm have been paid therefrom. *Menagh v. Whitwell*, 52 N.Y. 146 (1873). However, even in that case it seems admitted that creditors of the new firm have priority over creditors of the old firm in all the assets of the new firm including those acquired from the old firm. *Id.* at 169. In addition the opinion in *Wehrman v. McFarlan*, 6 Ohio N.P. 333, 335 (1899) contains the phrase, "as in an ordinary firm where the incoming of a new partner constitutes a new partnership, and the assets alone, and not the partner personally, are liable for old debts. . . ." On the other hand the theory can be advanced that a transfer to a retiring partner or to a third person of a partner's interest destroys the partner's lien since he transfers all his interest in the property. *Bankley v. Tapp*, 87 Ind. 25 (1882). Mr. Mechem says "The whole subject is now very much in confusion and uncertainty. . . ." MECHEM, *THE ELEMENTS OF THE LAW OF PARTNERSHIP* § 462 (2d ed. 1920). Mr. Lewis, without citing cases, states that the old firm creditors take after the new firm creditors in all the assets of the new firm. Lewis, *The Uniform Partnership Act*, 24 YALE L. J. 616, 634 (1915).

<sup>168</sup> *Smead v. Lacey*, 12 Ohio Dec. Rep. 597 (Super. Ct. 1896) is an excellent example of the technique used by the courts to find an assumption of old firm debts by the incoming partner and thus protect creditors of the old firm in the assets of the new firm.

one or all the partners to third persons or the remaining partner is in fraud of creditors.<sup>169</sup>

In terms of legal theory under the Act dissolution is not caused merely by the conveyance by a partner of his interest;<sup>170</sup> it is equally true that the Act permits subsequent voluntary dissolution by the remaining partners<sup>171</sup> and recognizes dissolution by the withdrawal of a partner.<sup>172</sup> These provisions would seem to indicate that contrary to common-law theory, the addition of a further partner unaccompanied by any withdrawal does not dissolve.<sup>173</sup> Not only is this contrary to the present attitude in Ohio as to dissolution, but other sections of the Act stipulate that a newly admitted partner is liable for prior firm debts, with the limitation, however, that this liability can be satisfied only from partnership property.<sup>174</sup> Since the Act fails to limit this latter principle to assets acquired from the old firm, it is apparent that the Act does away with the uncertainty that exists at common law concerning the ability of old firm creditors to reach old firm assets in the possession of the new firm. Further this provision permits the old firm creditors to reach any new assets which the new firm acquires. Thus under the Act, both old and new firm creditors share equally in all assets of the new firm.

The important modification entailed by this language relates to the capacity of prior firm creditors to reach assets of the new firm established subsequent to the change in personnel. The Act thus changes the common law and permits prior firm creditors to retain their status as such in respect to firm assets subsequent to admission of the new partner. Not only is this consequence expressly spelled out in a later section of the Act, but it is extended to a substantial variety of cases where, by the Act, dissolution has in fact occurred but "the business is continued without liquidation of the partnership affairs".<sup>175</sup>

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<sup>169</sup> See *Andres v. Morgan*, 62 Ohio St. 236, 56 N.E. 875 (1900) (court not only found an assumption of debts but found that the transfer of all the assets of a partnership to a corporation organized by all the partners tended to operate as a fraud on creditors).

<sup>170</sup> THE ACT § 27.

<sup>171</sup> THE ACT § 31 (1) (c).

<sup>172</sup> THE ACT § 29.

<sup>173</sup> *Lichtenberger, The Uniform Partnership Act*, 63 U. OF PA. L. REV. 639, 644, (1915). But see *Lewis, The Uniform Partnership Act*, 24 YALE L. J. 617, 635 (1915).

<sup>174</sup> THE ACT §§ 17, 41 (1).

<sup>175</sup> THE ACT § 41. In brief, under the Act, as long as one of the old firm remains as a member of the new firm or as sole proprietor of the old firm's business, creditors of the old firm continue to be creditors of the new firm or sole proprietor. If all the members of the old firm sell to third parties, creditors of the old firm are not creditors of the third parties unless the third parties promise to pay the debts of the old firm. Whether a partner-

It may thus be said that the Act affirmatively protects persons whose claims against the partnership arose prior to the change in personnel, and permits them to continue their status as firm creditors as to the property of the new firm after this change, whether or not the change has been such as to constitute a dissolution under the Act.

Discussion to this point has assumed that the partners have entered into no agreement, express or implied, as to these prior claims. The present law of Ohio recognizes certain contrasting consequences dependent upon such agreements.

Thus, where an incoming partner expressly or by implication assumes prior firm debts, or where remaining partners assure a withdrawing partner of such an assumption, or where a retiring partner makes such an assumption, Ohio has analogized the consequent relation between these persons to a suretyship contract. The assuming obligor, whether or not already obligated to the firm creditor, is likened to a principal, and the obligee to a surety with a right to reimbursement in the event of being forced by the creditor to pay the debt of his former firm.<sup>176</sup> Ohio courts have viewed this relationship as set up by implication exclusively between the parties, and only operative as to the old firm creditor in case he has been informed of it and has consented to the modification consequent upon his acceptance of a combination of primary and secondary obligors in lieu of the prior combination of joint primary obligors.<sup>177</sup>

The Act has codified these principles to the extent of recognizing that dissolution does not discharge individual liability of any partner, except as agreed to expressly or impliedly both by his co-partners and the firm creditor as well,<sup>178</sup> but it varies from the present Ohio view in that it in effect forces upon a firm creditor a suretyship relation of which he has notice but to which he need not have assented. Thus, where one person has agreed to assume firm obligations, the partner whose obligations have been thus assumed is discharged (as a surety would be) from liability to any creditor of the partnership who, knowing of the agreement, consents to a

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ship is "continued without liquidation" is a question of fact. Wright, *California Partnership Law and the Uniform Partnership Act*, 9 CALIF. L. REV. 391, 410 (1921).

<sup>176</sup> Rawson v. Taylor, 30 Ohio St. 389 (1876); Wilson v. Stilwell, 14 Ohio St. 464 (1863); Butler v. Birkey, 13 Ohio St. 514 (1862); Still v. Holland, 1 Ohio Dec. Rep. 584 (C. P. 1853).

<sup>177</sup> Rawson v. Taylor, *supra* note 176.

<sup>178</sup> THE ACT § 36(1) and (2). The individual property of a deceased partner, while liable for all obligations of the partnership incurred while the deceased was a member of the firm, is subject to the prior payment of the deceased's separate debts. THE ACT § 36 (4).

material alteration in the nature or time of payment of such obligations.<sup>179</sup> While this protects the creditor's rights against all his obligors, it forces him on notice to deal with them as though they were principal and surety at the risk of losing all rights against the one who is now in the position of surety.<sup>180</sup>

It will be noted that the Act does not specify what shall constitute evidence of assumption. Doubtless the holdings of present Ohio cases remain unchanged. By them it has been stated that in a transfer of an interest by a withdrawing partner to a co-partner there is a presumption that the latter assumes firm debts;<sup>181</sup> but that in a transfer to a stranger there is no comparable presumption.<sup>182</sup> In either instance evidence of actual intent is relevant.

It has already been seen that under the Act the conveyance by a partner of his interest does not in itself constitute a dissolution, although at common law this is held otherwise.<sup>183</sup> The Ohio cases hold that a transferee does not become, nor has he a right to become, a partner with the remaining partners.<sup>184</sup> His sole right is to an accounting, inspection of the books and sufficient information to assure his protection. To acquire the further right to membership in the firm he must have the consent of all remaining co-partners. Otherwise they are free upon dissolution to form a new firm with or without him as a member.

The Act affirms this position of the transferee as having no right beyond that to his assignor's share in the profits. The Act goes further, however, than the present Ohio decisions in that it specifically precludes the transferee from participation in management, from all right to information, or from inspection of books or accounting. Upon dissolution, however, the transferee has a limited right to such an accounting.<sup>185</sup> In the event of lapse of the time specified for its continuance, or at any time in case the partnership is one at will, the Act grants the transferee the right to a dissolution by judicial decree.<sup>186</sup> Both provisions, it may be noted, preclude the

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<sup>179</sup> THE ACT § 36 (3).

<sup>180</sup> *Lenger v. Hulst*, 259 Mich. 640, 244 N.W. 187 (1932).

<sup>181</sup> *Pendleton v. Foley*, 21 Ohio App. 118, 152 N.E. 778 (1925). Since the Act by Section 41 permits old firm creditors to share equally with new firm creditors and since, by Section 36(c), upon assumption of debts a retiring partner must be treated as a surety where the creditor knows of the assumption of debts, the reason for the common-law presumption may no longer exist under the Act.

<sup>182</sup> See *Andres v. Morgan*, 62 Ohio St. 236, 244, 56 N.E. 875, 877 (1900).

<sup>183</sup> See *Meridian Nat. Bank v. McConica*, 8 Ohio C.C. 442, 456 (1894).

<sup>184</sup> See *Nixon v. Nash*, 12 Ohio St. 647 (1861) (indicates rights of a purchaser at a sale upon execution on a separate partner's interest in the firm.)

<sup>185</sup> THE ACT § 27.

<sup>186</sup> THE ACT § 32(2).

transferee from interfering in any way with the administration of the firm during any term in effect at the time of the transfer.

It is thus apparent that adoption of the Act in Ohio would modify appreciably the relations and rights of the partners and creditors consequent upon transfer of a partner's interest. This modification relates to the question whether the addition of an incoming partner constitutes a dissolution; it relates to the position of a firm creditor who has learned of but not assented to an assumption agreement, and to the position of the transferee of a partner's interest. But the most significant modification is in the clear-cut recognition that change in personnel with continuation of business without liquidation, whether or not this may have effected a dissolution, does not disturb the rights of prior firm creditors to approach the assets of the continuing enterprise on a parity with those firm creditors whose claims have arisen since the change in personnel. This contribution is stabilizing in its protection of the rights of firm creditors, and is realistic in its recognition of the practical acceptance of a continuing enterprise as an economic unit regardless of the fact that in legal theory there has been both a disintegration and a reestablishment.

#### DISTRIBUTION OF PARTNERSHIP ASSETS

The fact that a debtor is a partner does not in itself change the nature of the creditor's substantive rights either at law or in equity. What it does change, as has been seen, is the nature of the assets accessible to him. This is as true in the case of a partnership creditor as in that of a separate creditor.

A creditor of the firm—one whose obligation has been incurred within the partnership scope—has available both at common law and equity the joint, and in occasional instances previously discussed, the joint and several, obligations of all the partners.<sup>187</sup> This aspect of jointness gives him access to the individual assets of each separate partner as well as to those that are describable as partnership assets. In contrast the separate creditor of one partner can reach only the assets of his individual debtor-partner. As a consequence it is possible in a proceeding at law for a firm judgment creditor to levy on the separate assets of any partner at will and by reaching them first to subordinate the separate creditor.<sup>188</sup> On the other hand, should a separate creditor pursue his debtor's interest in the firm, and attach a firm asset prior to levy by a firm creditor, he will nevertheless be displaced by a later levy by a firm creditor.<sup>189</sup>

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<sup>187</sup> See text pp. 628-630 *supra*.

<sup>188</sup> See *Hawkins v. Lasley*, 40 Ohio St. 37, 38 (1883).

<sup>189</sup> *Page v. Thomas*, 43 Ohio St. 38, 1 N.E. 79 (1885).

Thus in a competition between separate and partnership creditors at law as to individual assets, the priority is first come first served; but as to partnership assets, the priority always favors the partnership creditor.

It is only in cases of insolvency that conflicts of this type become real, and then it is virtually always that this issue will go before a court of equity. At first glance the maxim that "equity follows the law" would seem to foreshadow the recognition of priorities in equity similar to those obtainable by proceedings at law, and in fact a few jurisdictions have consistently followed this principle.<sup>190</sup> As will be seen, Ohio courts have diverged from it markedly.

Subject to the proposition that any legal liens already validly obtained will be left undisturbed,<sup>191</sup> the courts of equity in this state have proceeded to lay down their own sequence of priorities. The starting point is the fact that at law firm creditors can reach two funds, and separate creditors but one. From this is evolved "a corresponding and correlative rule giving a preference to the individual creditors of a partner in his separate property."<sup>192</sup> This accomplishes a relegation of partnership creditors to the surplus assets of the partners-debtors remaining after all individual obligations have been satisfied. In theory this subordinates a firm creditor as to separate assets just as at law a separate creditor is already subordinated as to partnership assets. A parallel form of expression is also found in the decisions: that each partner has in equity a right that firm assets be applied to firm debts before his own are approached; that since a firm creditor may appropriate the rights of his debtors, he has acquired "derivatively" this same priority.<sup>193</sup> Creditors of separate partners are thereupon given by equity a comparable right that separate assets shall be first used for the satisfaction of separate debts. Clearly, it would hardly be accurate to say that the final result disregards the relative rights of firm and separate creditors at law, for it is based squarely upon disapproval of those very priorities. More properly, it is an adjustment deliberately improvised to accomplish a result which equity courts regard as more desirable in terms of equality of distribution

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<sup>190</sup> *E. g.*, *Robinson v. Security Co.*, 87 Conn. 268, 87 Atl. 879 (1913); *Bardwell v. Perry*, 19 Vt. 292 (1847); *Freeport Stone Co. v. Carey*, 42 W. Va. 276, 26 S.E. 183 (1896); *Pettyjohn v. Woodruff*, 86 Va. 478, 10 S.E. 715 (1890); *Blair v. Black*, 31 S.C. 346, 9 S.E. 1033 (1889).

<sup>191</sup> While there are apparently no Ohio cases on this point, the proposition is well supported at common law in other jurisdictions. *E. g.*, *Meech v. Allen*, 17 N.Y. 300 (1858). MEACHEM, *ELEMENTS OF THE LAW OF PARTNERSHIP* § 463 (2d ed. 1920).

<sup>192</sup> *Rodgers v. Meranda*, 7 Ohio St. 179, 181 (1857).

<sup>193</sup> *Rodgers v. Meranda*, *supra* note 192; *Miller v. Estill*, 5 Ohio St. 508 (1856).



of remedy between the two groups of creditors. Thus has evolved what has become known, not too inaptly, as "the jingle rule,"—that since partnership creditors have priority in partnership assets, so should separate creditors have priority in the separate assets of their debtor-partner, and that each type of creditor has a residuary right to any surplus remaining in the other's fund.<sup>194</sup>

The Act has accepted this principle for the marshalling of assets as between firm and separate creditors.<sup>195</sup> It deals with the normal situation where the property of both the firm and its members is before the court for distribution; allocates priority in firm property to firm creditors, in separate property to separate creditors, "saving the rights of lien or secured creditors as heretofore."<sup>196</sup> The word partnership "assets" is not used, this having been previously defined as including both property and such contributions of partners as may be necessary to pay firm debts.<sup>197</sup> Thus, as at common law, the partners' duty to contribute is not included among the "property" to be distributed to firm creditors.<sup>198</sup> A further section marshalls the priorities against the property of an insolvent partner in the order of separate creditors, partnership creditors and partners "by way of contribution."<sup>199</sup> In brief then, outside of one minor exception to the

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<sup>194</sup> *Rodgers v. Meranda*, *supra* note 192.

<sup>195</sup> THE ACT § 40(h). This was not, however, without the misgivings of the Act's draftsman who felt compelled to yield in this respect more to expediency, in view of its wide judicial acceptance, than to logic. Lewis, *The Uniform Partnership Act, A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 291, 306 (1916).

<sup>196</sup> THE ACT § 40 (h).

<sup>197</sup> THE ACT § 40(a).

<sup>198</sup> THE ACT § 40(h). As indicated in the text, the definition of partnership assets does include the right of contributions which the respective partners have as an asset of the partnership. THE ACT § 40(a). In view, however, of the fact that that right is not property for the purpose of marshalling among creditors, the only practical result of calling the right to contribution a partnership asset is to make certain that a partnership is not insolvent for bankruptcy purposes where there is one solvent partner. The cases under the bankruptcy act were divided on this subject before the passage of the Act. Holding that all partners must be insolvent before the partnership was insolvent in the bankruptcy sense: *Vaccaro v. Security Bank of Memphis*, 103 Fed. 436 (C.C.A. 6th 1900); *In re Forbes*, 128 Fed. 137 (D. Mass. 1904); *Davis v. Stevens*, 104 Fed. 235 (D.S.D. 1900); *In re Blair*, 99 Fed. 76 (S.D.N.Y. 1900); see *Francis v. McNeal*, 228 U. S. 695, 700 (1913). *Contra: In re Bertenshaw*, 157 Fed. 363 (C.C.A. 8th 1907); *In re Everybody's Market*, 173 Fed. 492 (D. Okla. 1908); *In re McMurtrey & Smith*, 142 Fed. 853 (W.D. Texas 1905).

<sup>199</sup> THE ACT § 40(i). In this connection it is to be noted that this same scheme of priorities is applied in connection with the liability of a deceased partner's individual property for partnership debts. Section 36 (4) provides that separate creditors have a priority over firm creditors in such individual property.

operation of the marshalling rules in Ohio,<sup>200</sup> the Act restates the basic principle long recognized here in respect to the relative priorities of firm and separate creditors competing for satisfaction of their claims in equity.

In the foregoing discussion, it has been assumed that the partnership whose property is in distribution is actual in the sense discussed earlier—that the indicia of agency and profit sharing are in fact present. But in the event the firm exists only on the theory of estoppel—that by virtue of an appearance of partnership for which certain persons are responsible and on which a creditor relied, these persons are precluded from denying that they are partners—the application of these principles becomes more difficult.

There is some authority at common law to the effect that creditors of such an apparent partnership can claim priority over separate creditors in property apparently devoted to partnership purposes to the same extent as though the partnership in fact existed.<sup>201</sup> The Act specifically repudiates such a possibility,<sup>202</sup> and approaches the problem from the factual viewpoint that as between the alleged partners there is no partnership, and that the liability of the alleged partners to third persons is based solely on policy. Consequently, this theory continues, the separate creditors who have extended credit to the alleged partners on the basis of property which as a matter of fact has not been devoted to any partnership, should not be forced to stand by while persons who were misled into believing that the property was partnership property take the first and perhaps the only bite out of the property. Thus the net effect of this view is that creditors whose claims against the firm rest solely on estoppel never acquire the priorities given by the Act to partnership creditors.

Before leaving the general problem of marshalling assets of an actual partnership, note should be taken of the peculiar position

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<sup>200</sup> The Ohio courts have held that where there are no firm assets and no living solvent partners, the reason for the "jingle rule" disappears, and firm creditors have a right to share ratably with the separate creditors in the individual assets of the insolvent partners. *Grosvenor v. Austin*, 6 Ohio 104 (1833); *Brock v. Bateman*, 25 Ohio St. 609 (1874). The Bankruptcy Rule was contra. *Farmer's Bank v. Ridge Ave. Bank*, 240 U.S. 498 (1915). The Act adopts the Bankruptcy Rule in Section 40(i).

<sup>201</sup> *Thayer v. Humphrey*, 91 Wis. 276, 64 N.W. 1007 (1895). *Contra*: *Broadway Nat. Bank v. Wood*, 165 Mass. 312, 43 N.E. 100 (1896); *Johnson v. Williams*, 111 Va. 95, 68 S.E. 410 (1910). There is little Ohio authority of significance. In *Meridian Nat. Bank v. McConica*, 8 Ohio C.C. 442, 457, 40 Ohio C.D. 106 (1894) the court stated, "So far as the respective rights of creditors are concerned, to hold it partnership property, there must be a partnership *in fact*." But see dictum to the contrary in *Paddock Overmeyer & Co. v. Daggett*, 9 Ohio Dec. 371 (C.P. 1899).

<sup>202</sup> § 16. Commissioners' Note, 7 UNIFORM LAWS ANN. 25 (1938).

of a partner who is himself either a creditor or debtor of the firm. If he is a creditor, he or his separate creditors through him may seek to share with firm creditors in the partnership property. If, on the other hand, he is indebted to the firm, the firm may seek to compete with separate creditors in the individual assets of the debtor-partner. The courts at common law do not permit this in either instance. This is on the theory that to allow either the partner, where he is a creditor of the firm, or his separate creditors through him to share in the partnership property would permit a debtor to compete with his own creditors.<sup>203</sup> Moreover, even though a partner who has loaned money to his partnership is entitled to contribution from his co-partner, such a partner is not permitted to share equally with a firm's creditors in the surplus assets of a co-partner's individual assets; but must stand by with recourse only against the surplus remaining after their claims have been satisfied.<sup>204</sup>

Conversely, where a partner is a debtor of his firm, the firm cannot claim against the debtor-partner's individual estate in competition with that partner's separate creditors. That again is on the theory that it would permit the debtor-partner as a member of the firm to compete with his own separate creditors.<sup>205</sup>

Section 40 (i) of the Act accepts these common-law principles but makes two variations not previously commented upon. Thus, the Act does not permit a partner who has paid all the partnership debts to share with separate creditors in the assets of the individual co-partners. While such sharing is permitted at common law,<sup>206</sup> indirectly this amounts to a denial of the usual rule that separate creditors are first in the individual assets. This is true because the partner's claim is in reality attributable to his having paid claims that firm creditors could not themselves have advanced successfully in competition with individual creditors. The Act merely extends to this peculiar circumstance the general principle already well established.

The remaining variation concerns the right of a partner to compete with individual creditors of a co-partner as to a claim that is disrelated to partnership affairs. Unlike the common law,<sup>207</sup> the Act permits such a claim to be asserted in competition with individual creditors.<sup>208</sup> This solution sharpens the distinction between claims

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<sup>203</sup> *Rodgers v. Meranda*, 7 Ohio St. 179 (1857).

<sup>204</sup> *MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIP* § 457 (2d ed. 1920).

<sup>205</sup> *Id.* at § 456.

<sup>206</sup> While there are no Ohio cases, the usual common-law rule was apparently contra. *MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIP* § 456 (2d ed. 1920).

<sup>207</sup> *MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIP* § 451 (2d ed. 1920).

<sup>208</sup> *THE ACT* § 40 (i).

related and those not related to the firm business and places a partner who holds the former type on a parity with other individual creditors. Also, since his claim is properly an asset of his separate estate which his own separate creditors, in event of his insolvency, may wish to assert, this rule preserves their right to appropriate it. The draftsman of the Act, Mr. Lewis, has pointed out that the common-law rule identified such a claim with firm assets and in effect took it from the creditor-partner's personal estate and allocated it to the satisfaction of firm creditors.<sup>209</sup>

One major problem remains, even after firm claims have been paid. This concerns the respective rights of the partners among themselves. By hypothesis, debts owed by the firm to individual partners will have been paid. Ordinarily, these are called advances and one Ohio case has intimated these will carry interest.<sup>210</sup> Since they are firm debts, they must be borne equally by each partner, including the one making the advance.<sup>211</sup> The repayment of capital contributions is next in order.<sup>212</sup> This too is a firm obligation to be borne jointly by all. No interest is allowed.<sup>213</sup> Finally, deficiencies in either classification are shared in the same proportion as other losses, presumptively in the ratio agreed on for sharing profits.<sup>214</sup> In the event one or more partner is out of the jurisdiction or insolvent at least one Ohio case has required the remainder to bear his share.<sup>215</sup>

Except for adding the right to interest on capital contributions, the Act affirms all these principles. It allows interest on both capital and advances<sup>216</sup> and requires contribution from solvent partners within the jurisdiction of the court to make up the shares of others who fail or are unable for various reasons to contribute their pro rata part.<sup>217</sup> Furthermore, the Act provides that an assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce contributions.<sup>218</sup>

The principles that have just been discussed have all been based on the premise that the partners have not attempted themselves to solve their own problems by applying firm assets in various ways

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<sup>209</sup> Lewis, *The Uniform Partnership Act, A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 291, 308 (1916).

<sup>210</sup> *Wayne v. Hinkle*, 9 Ohio Dec. Rep. 389 (Super. Ct. 1887).

<sup>211</sup> MECHEM, *ELEMENTS OF THE LAW OF PARTNERSHIP* §§ 469, 470 (2d ed. 1920).

<sup>212</sup> *Id.* at § 469.

<sup>213</sup> *Wayne v. Hinkle*, 9 Ohio Dec. Rep. 389 (1887).

<sup>214</sup> *Wischmeyer v. Siebeneck*, 46 Ohio App. 486, 189 N.E. 509 (1933).

<sup>215</sup> *Ibid.*

<sup>216</sup> Advances, Section 18(c). Capital from date repayment should be made, Section 18(d).

<sup>217</sup> THE ACT § 40(d).

<sup>218</sup> THE ACT § 40(e).

to resolving their difficulties. Thus, they may have conveyed them to particular firm creditors, to their individual creditors or to themselves, or they may have conveyed their individual assets to creditors of the firm. Partners may not, of course, make conveyances that are fraudulent; nor may they establish preferences between creditors in contemplation of insolvency.<sup>219</sup> The Act does not touch these matters, and in consequence they are not dealt with here.<sup>220</sup>

#### DISSOLUTION INTER VIVOS

It is of course a familiar principle that the term "dissolution" is used in the decisions as descriptive of a change in the relationship of partners that ultimately culminates in termination of the enterprise.<sup>221</sup> It is the beginning of the end, but not the end itself, in that a substantial group of agency powers persist beyond dissolution. Only when these powers have actually ceased, can the enterprise be said to have fully terminated. Put differently, the ordinary authorities characteristic of a going concern persist until dissolution; thereafter a less extensive group of authorities, characteristic of a winding up process only, continues until that process is completed.<sup>222</sup> Section 30 of the Act restates this with admirable clarity.

Ohio and other jurisdictions indicate that dissolution may occur in three ways: by acts of the partners themselves, by events, and by judicial decree. All three are preserved in the Act. Thus, both at common law and under the Act a partnership at will may be dissolved rightfully at any time;<sup>223</sup> a partnership for a term may also be dissolved at any time, but subject to a cause of action for wrongful dissolution if the term is still pending.<sup>224</sup> The occurrence of

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<sup>219</sup> OHIO GEN. CODE §§ 8618 and 11104 (1938).

<sup>220</sup> The Act was criticized for leaving the problem of fraudulent conveyances in a state of confusion. Crane, *The Uniform Partnership Act, A Criticism*, 28 HARV. L. REV. 726, 774 (1915). The answer given was that the problem would be met in a Uniform Fraudulent Conveyance Act which the Commissioners then had under consideration. Lewis, *The Uniform Partnership Act, A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 291, 296 (1916). Such an Act has been prepared in fact and covers fraudulent conveyances as applied to partnerships. UNIFORM FRAUDULENT CONVEYANCES ACT, 9 UNIFORM LAWS ANN. 327 (1938). That Act is the subject of another article in the current issue of this Journal. Reference is made thereto for a discussion of the application of fraudulent conveyances to partnerships. Rose and Hunsinger, *Transfers in Fraud of Creditors, Ohio Law and The Uniform Act*, page 571 *supra*.

<sup>221</sup> See *Palmer v. Dodge*, 4 Ohio St. 21, 29 (1854).

<sup>222</sup> *Ibid.*

<sup>223</sup> See *Eagle v. Bucher*, 6 Ohio St. 296, 301 (1856). THE ACT § 31(1)(b).

<sup>224</sup> *Cockley v. Brucker*, 54 Ohio St. 214, 44 N.E. 590 (1896). But see *Durbin v. Barber*, 14 Ohio 311, 315 (1846). THE ACT § 31(2). At common law a few American jurisdictions held that a partnership for a term could

certain events may be so inconsistent with continuance of the enterprise as to constitute a dissolution by operation of law. Examples are death or bankruptcy of a partner, conveyance of a partner's interest, and assignment for benefit of creditors. There are Ohio decisions or dicta supporting each.<sup>225</sup> In other states, illegality of the enterprise and war between the countries of which the partners are citizens will do the same,<sup>226</sup> although Ohio material is lacking here. The Act mentions all but two of these—war and assignments for creditors—and, except for conveyance of a partner's interest, provides that the occurrence of each of these shall constitute a dissolution.<sup>227</sup> The problems raised by the provision that "a conveyance by a partner of his interest does not of itself dissolve the partnership," have been discussed and the conclusion already drawn that while conveyance unaccompanied by a withdrawal does not dissolve, an act of withdrawal does, and that the legal consequences of either type of conveyance differ from the common law in only one substantial respect—the application of firm assets.<sup>228</sup>

The third manner of dissolution relates to those acts for which a court of equity will grant dissolution. These are instances wherein the partnership is for a fixed time or a specific undertaking but continuance would not be profitable or desirable. Incapacity, insanity, misconduct and impossibility of success are stated to be grounds for judicial dissolution at common law.<sup>229</sup> They are also causes for judicial dissolution under the Act.<sup>230</sup>

Dissolution, once it occurs by any of these means, reduces the partnership scope to those functions that relate only to winding up the concern. This is true both under present Ohio decisions and under the Act.<sup>231</sup> But the mere fact of dissolution is not in all cases enough in itself to accomplish this effect either as to partners or as to third persons. In many, some variety of notice is a condition precedent.

At common law it is ordinarily said that where dissolution is

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not be dissolved. *MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIP* § 357 (2d ed. 1920).

<sup>225</sup> *In re Gurnea*, 111 Ohio St. 715, 146 N.E. 308 (1924) (death); see *H. B. Clafflin Co. v. Evans*, 55 Ohio St. 183, 191, 45 N.E. 3 (1896) (conveyance of a partner's interest; assignment for benefit of creditors); *Hamilton v. Cutler*, 9 Ohio Dec. Rep. 187, 188 (Super. Ct. 1884) (bankruptcy). Dissolution by death is discussed at length below. See text pp. 657-661 *infra*.

<sup>226</sup> *MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIP* § 370 (2d ed. 1920) (illegality); *Sutherland v. Mayer*, 271 U.S. 272 (1926) (war).

<sup>227</sup> *THE ACT* § 31.

<sup>228</sup> See text page 643 *supra*.

<sup>229</sup> *Durbin v. Barber*, 14 Ohio 311 (1846); *MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIP* §§ 376, 377, 380 (2d ed. 1920).

<sup>230</sup> *THE ACT* § 32(1).

<sup>231</sup> *Palmer v. Dodge*, 4 Ohio St. 21 (1854). *THE ACT* § 33.

by act of a partner, as distinguished from an event (operation of law), or a judicial decree, notice must be given both to co-partners and to any third persons who have previously relied on the firm's credit.<sup>232</sup> The former notice is for the purpose of terminating the agency in fact; the latter is in order to prevent operation of the doctrine of estoppel. There are then two factors to consider—the manner of dissolution in the sense of the act, event, or decree, and the person as to whom it is to be effective. This latter factor is further broken down in respect to third persons at common law into various gradations dependent upon the nature of the third person's prior reliance or knowledge as to the credit or personnel of the partnership.

Under the Act these classifications are preserved, but the rights and duties have in certain respects been modified. Thus under the Act in the case of a co-partner, no notice at all is required if dissolution is by judicial decree; but if it is by act, bankruptcy, or death of a partner, then the partner purporting to execute his authority must have had knowledge, if dissolution occurred by act; or must have had either knowledge or notice if by death or bankruptcy.<sup>233</sup> Otherwise his co-partners are liable for their pro rata share of liability as if the partnership had not been dissolved. This is contrary to the present Ohio view where knowledge of a co-partner is necessary in case of dissolution by act, but not in the case of death or bankruptcy.<sup>234</sup> On the other hand the act requires no notice in case of dissolution because of illegality.<sup>235</sup>

In the case of third persons, it is obvious both at common law and under the Act that a partner has actual authority to bind his co-partners as to winding up activities; but the Act further provides

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<sup>232</sup> *Eagle v. Bucher*, 6 Ohio St. 296 (1856); *Myers v. Standart*, 11 Ohio St. 29 (1860); see *Palmer v. Dodge*, 4 Ohio St. 21, 29 (1854).

<sup>233</sup> THE ACT § 34. Section 3 of the Act defines the terms "knowledge" and "notice". "Knowledge" is defined to include not only actual knowledge but also knowledge of such other facts under the circumstances as shows bad faith. "Notice" means that the person who claims the benefit thereof states the fact to the person to be notified or delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at the place of business or residence of the person to be notified.

<sup>234</sup> As to knowledge in case of dissolution by act, see note 232 *supra*. As to knowledge or notice in case of dissolution by death or bankruptcy, see *Easton v. Ellis*, 1 Hand. 70, 12 Ohio Dec. Rep. 32, 34 (Super. Ct. 1854). The Act's provision as to this, note 233, *supra*, is in line with the famous Ohio case of *Ish v. Crane*, 13 Ohio St. 574 (1862) where it was held that death of the principal did not terminate an agency where neither the agent nor the third person had knowledge or notice of the death, and where the act is one "not necessarily to be done in the name of the principal."

<sup>235</sup> THE ACT §§ 33, 34, 35(1) (b) & (3) (a).

that this authority extends to "any transaction which would bind the partnership if dissolution had not taken place," in cases where the third person has extended credit to the firm before dissolution and has had no knowledge or notice of it.<sup>236</sup> Even where he has not extended credit, the third person is entitled to publication in a newspaper if he has so much as heard of the partnership prior to dissolution.<sup>237</sup> These two categories of creditors are both recognized in Ohio decisions; but while knowledge or notice is required in the case of a so-called old customer,<sup>238</sup> the only requirement as to a new one who has previously heard of the firm is a reasonable effort to give notice.<sup>239</sup> The case of a dormant or secret partner is dealt with under the Act just as at common law; no notice of dissolution to third persons is required of such a partner.<sup>240</sup>

It has long been a common-law principle that on dissolution all partners have equally the right and duty, unless agreed otherwise, to participate in the winding up activities.<sup>241</sup> The Act affirms this but excludes any partners who have been responsible for a wrongful dissolution.<sup>242</sup> It has also been well established by the decisions that each partner on dissolution has the right, referred to earlier, to insist that partnership property be applied to the payment of partnership obligations before any of it is distributed to the partners or used to pay their separate debts.<sup>243</sup> This is really in the nature of a remedy in equity though it has come to be known misleadingly as the partner's "lien." This too is recognized under the Act, but with an added specification not found in the decisions, that the distribution of any surplus in partnership property, not needed for payment of firm debts, shall be paid each partner in cash.<sup>244</sup> In the case of a partnership for a term, the Act distinguishes between partners

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<sup>236</sup> THE ACT §§ 33, 35 (1) (b).

<sup>237</sup> THE ACT § 35(1) (b) (II). The Act again makes no distinction between acts of partners and events as the basis of dissolution. In both types, knowledge or notice is required, Sections 33 and 35 (1) (b) save in case of illegality or where the third person deals with the partner who is bankrupt. § 35(3) (a) and (b). At common law, creditors were only entitled to notice when the dissolution was by act of partners, see note 232 *supra*, not when dissolution occurred by operation of law. *Easton v. Ellis*, 12 Ohio Dec. Rep. 32 (Super. Ct. 1854).

<sup>238</sup> *Myers v. Standart*, 11 Ohio St. 29 (1860); see *Palmer v. Dodge*, 4 Ohio St. 21, 29 (1854).

<sup>239</sup> *Schneider v. Stern*, 4 Ohio C.C.(N.S.) 55, 44 Ohio C.D. 75 (1905); *Crosier v. McNeal*, 17 Ohio C.C. 644, 6 Ohio C.D. 748 (1895).

<sup>240</sup> See *McFarland v. McHugh*, 12 Ohio C.C. 485, 488, 5 Ohio C.D. 546, 548 (1891). THE ACT § 35(2).

<sup>241</sup> *Palmer v. Dodge*, 4 Ohio St. 21 (1854).

<sup>242</sup> THE ACT § 37.

<sup>243</sup> *Greene v. Greene*, 1 Ohio 535 (1824); *Sumner v. Hampson*, 8 Ohio 328 (1838); *Miller v. Estill*, 5 Ohio St. 508 (1856).

<sup>244</sup> THE ACT § 38(1). See note 108 *supra*.



who have wrongfully brought about a dissolution and those who have fully observed the partnership agreement, giving the latter as at common law a cause of action against the former for breach of the articles<sup>245</sup> and permitting them to continue the business during the balance of the term with a right of possession of partnership property on tender of a bond approved by the court protecting the wrongdoer as to his interest less his liability in damages.<sup>246</sup> Ohio decisions do not indicate any such practice today. The Act adds that a partner who has wrongly dissolved may have the balance of his distributive share determined and paid him in cash whereupon he is released from all partnership liabilities. He is deprived, however, of any share in the value of partnership good will.<sup>247</sup> Creditors of the old firm, as in cases discussed earlier, remain creditors of the continuing partnership.<sup>248</sup>

These provisions are essentially consistent with the present Ohio decisions. As pointed out, they supplement these, however, with certain details not yet passed upon here, add a regulatory device by way of bond, and protect creditors of the earlier firm in a way not found at common law. These contributions would appear to be in the interest of completeness, clarity, and stability of the partnership enterprise in the face of the emergency of dissolution in violation of the partnership agreement.

While at common law a partnership agreement could be rescinded because of fraud or misrepresentation of one of the parties, the rights of the partners who elected to rescind on these grounds were not detailed. The Act defines these rights with some precision.<sup>249</sup>

Finally, it is more explicit than the common law as to when after dissolution a partner's right to an account accrues. It fixes this at the date of dissolution.<sup>250</sup> Problems concerning the application of the Statute of Limitations are thus clarified.

#### DISSOLUTION BY DEATH

There are several aspects of the dissolution of a partnership by death of a partner that justify treatment apart from the more general discussions of dissolution from other causes. To begin with, the nature of the partnership relation accounts for certain legal consequences not found elsewhere. Partnership has been seen to be

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<sup>245</sup> *Cockley v. Brucker*, 54 Ohio St. 214, 44 N.E. 590 (1896). THE ACT § 38 (2) (a).

<sup>246</sup> THE ACT § 38(2) (b).

<sup>247</sup> THE ACT § 38(2) (c).

<sup>248</sup> THE ACT § 41 (5). See text page 643 *supra*.

<sup>249</sup> THE ACT § 39.

<sup>250</sup> THE ACT § 43.

but a branch of the larger law of agency, and it is familiar knowledge that except for the case of a power coupled with an interest,<sup>251</sup> death terminates the authority of an agent.<sup>252</sup> Further, the joint aspects of this partnership relation by definition include the concept of survivorship. The first of these principles would seem necessarily to destroy all winding-up powers that might otherwise have been exercised by the representative of the deceased partner; the second precludes the latter's estate from acquiring an interest in any of the partnership property. Finally, unlike any other aspect of dissolution, the Ohio statutes have explicitly dealt with dissolution by death. It is a combination then of these three factors that prompts separate treatment of what otherwise would be only one of many types of dissolution.<sup>253</sup>

The common law recognizes that upon dissolution by death of a partner, the surviving partners have the right and duty to possess the partnership property to the exclusion of the legal representative of the deceased partner for the purpose of winding up affairs of the firm.<sup>254</sup> Upon the death of the last surviving partner, his legal representative has this right and duty.<sup>255</sup> In either case, while the winding up partner has fiduciary responsibilities, he has only such authority as a similar partner would have in the case of dissolution *inter vivos*. He has, in other words, no authority to impose upon either his co-partner or the estate of the deceased partner new obligations characteristic of a going enterprise.<sup>256</sup> Patently, in the absence of special powers by contract or will, the representative has no authority of any sort to bind the survivors. At the same time prior firm obligations, with the exception of certain contracts personal to the deceased partner, are not terminated by death. Rather, they persist as to all obligors, including, where they are joint and

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<sup>251</sup> *Hunt v. Rousmanier*, 8 Wheat. 174 (U.S. 1823); see *Easton v. Ellis*, 12 Ohio Dec. Rep. 32, 35 (Super. Ct. 1854).

<sup>252</sup> See *Akron & C. J. R. R. v. Weedman*, 83 Ohio St. 88, 96, 93 N.E. 528, 530 (1910). But if neither the agent nor the third person has notice of the death of the principal, and the act is one "not necessarily to be done in the name of principal," the contract made by the agent with the third person will be binding on the estate of the principal. *Ish v. Crane*, 13 Ohio St. 574 (1862).

<sup>253</sup> The question of authority of remaining partners in absence of knowledge or notice of the death of one partner and the question of notice to third parties upon dissolution by death has been discussed in the text pp. 653-655 *supra*.

<sup>254</sup> *Lockwood v. Mitchell*, 7 Ohio St. 387 (1857); *Stewart v. Grant*, 24 Ohio L. Abs. 281 (App. 1937).

<sup>255</sup> *Dayton v. Bartlett*, 38 Ohio St. 357 (1882).

<sup>256</sup> *Kreis v. Gorton*, 23 Ohio St. 468, 472 (1872).

several, the estate of the deceased partner.<sup>257</sup> If the business of the partnership is continued by the surviving partner without agreement or provision therefor in the will, the estate of the deceased is entitled to profits earned by use of firm property in the interval between dissolution and final settlement;<sup>258</sup> or the representative may elect in lieu thereof to take interest on the value of the decedent's share even though no profits are made;<sup>259</sup> and he may proceed in equity to obtain an accounting to ascertain the interest of the deceased in the old partnership.<sup>260</sup>

It should be noted finally that at common law partners may in contemplation of death enter into agreements subjecting their personal estate at death to varying degrees of partnership liability. Similarly this may be done unilaterally by will. In either event a characteristic provision is to subject the decedent's interest in the firm, or some announced portion of his separate estate, to post mortem obligations incurred by the survivors.<sup>261</sup> While this effort will not succeed in preventing dissolution, it will serve to impose unique liabilities to firm creditors and may, if so intended, create rights in the representative to share in the profits without necessarily becoming a partner.<sup>262</sup>

These, it should be noted, are substantive rights. The Ohio statutes relating to dissolution of a partnership by death do not displace them. They do, however, set up an elaborate procedure for their use and regulation.

Thus the right of survivors to wind up is preserved, in that upon appointment of the representative of the estate of the deceased partner, the survivors are required to apply at once to the probate court for appointment of appraisers for partnership assets and a schedule of partnership debts.<sup>263</sup> In fact, if persons entitled fail to request probate of the decedent's estate, the survivor may himself apply.<sup>264</sup> On the other hand, if it is the survivor who fails to apply as to settlement of partnership accounts then, unlike the common law, the decedent's representative is entitled to apply.<sup>265</sup> Further, if

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<sup>257</sup> See *Weil v. Guerin*, 42 Ohio St. 299, 302 (1884); *Burgoyne v. Ohio L. Ins. & T. Co.*, 5 Ohio St. 586, 587 (1855). See note 81 *supra* and text thereto. The surviving partner in absence of special circumstances may not at common law charge compensation for his services in winding up the partnership. *Cameron v. Francisco*, 26 Ohio St. 190 (1875). The Act permits such compensation by Section 18(f).

<sup>258</sup> See *Cameron v. Francisco*, 26 Ohio St. 190, 194 (1875).

<sup>259</sup> MECHEM, *ELEMENTS OF THE LAW OF PARTNERSHIP* § 407 (2d ed. 1920).

<sup>260</sup> *Cameron v. Francisco*, 26 Ohio St. 190 (1875).

<sup>261</sup> *Peters v. Campbell*, 2 Ohio Dec. Rep. 526 (C.P. 1861).

<sup>262</sup> *McGrath v. Cowen*, 57 Ohio St. 385, 49 N.E. 338 (1898).

<sup>263</sup> OHIO GEN. CODE § 8085 (1938).

<sup>264</sup> OHIO GEN. CODE § 8087 (1938).

<sup>265</sup> OHIO GEN. CODE § 8088 (1938).

the representative assents and the court approves, the survivor may elect to purchase the interest of the decedent in the partnership at the appraised value less his share of partnership debts and liabilities.<sup>266</sup> In fact, if he fails to do so, he loses his common-law right as successor in interest and the representative is duty bound to apply for a receiver to wind up the firm business himself.<sup>267</sup>

Election by the survivor to buy the decedent's interest sets in operation a series of steps calculated to bring to light and settle all firm obligations, and to entitle the survivor ultimately to take over all the rights of the former firm.<sup>268</sup> In the case of real estate owned by the partnership, some portion of the legal title to which was in the decedent, the statute expressly states that only such as is used in whole or in part in the transaction of firm business shall be considered partnership property for the purpose of conveyance to the survivor.<sup>269</sup> This provision, it should be noted, limits firm realty to that actually used in the business as compared with the broader classification discussed earlier.<sup>270</sup> Finally, it should be pointed out that the statute recognizes the validity of provisions in contracts and wills setting forth other and different modes of settlement and distribution.<sup>271</sup>

This brief survey shows the Ohio substantive law to be essentially the product of courts, not of the legislature. It also shows that the procedural aspects of settlement of the affairs of both the partnership and the deceased partner, are now subject to comprehensive statutory coverage. When we turn now to the Act, it is this distinction that permits a ready statement that the Act contemplates virtually no change of substance in the present state of Ohio law. This is true because the Act is substantive in nature and its provisions are essentially embodiments of Ohio substantive principle. Moreover, for the same reason, the procedural provisions of the Ohio statutes are not in any way touched by the Act. Only one section—and that because it is substantive in nature—is affected.

In Section 26 (2) (d) of the Act it is provided that upon the death of a partner, his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, in which event his right in such prop-

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<sup>266</sup> OHIO GEN. CODE § 8089 (1938).

<sup>267</sup> OHIO GEN. CODE § 8091 (1938). See *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258, 266, 58 N.E. 805, 807 (1900). The same result is rendered if the legal representative of the deceased partner refuses to consent to the purchase by the survivor. *Weitz v. Weitz*, 15 Ohio App. 134 (1921).

<sup>268</sup> OHIO GEN. CODE §§ 8093, 8095, 8096, 8097, 8098 (1938). See *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258, 265, 58 N.E. 805, 807 (1900).

<sup>269</sup> OHIO GEN. CODE § 8098 (1938).

<sup>270</sup> See text pp. 633-635, *supra*.

<sup>271</sup> OHIO GEN. CODE § 8092 (1938).

erty vests in his legal representative. The property is to be used by such survivors only for partnership purposes. As we have seen, these are the common-law rules. Surviving partners have the right to wind up the partnership but under Section 37 the legal representative of a deceased partner may obtain winding up by the court. It could possibly be argued that this last section is inconsistent with the existing statutory method of settling a deceased partner's affairs since it apparently permits the surviving partner to wind up the affairs of a partnership without submission to the court and independent of a receiver unless the legal representative prevails upon a court to intervene. This section, however, is very broad. It is doubtful whether its later enactment would repeal the detailed procedure existing at present for the settlement of the estate of a deceased partner. Furthermore, the right granted by Section 37 is one that apparently exists even now at common law along with the statutory procedure, in the event the procedure provided by Ohio General Code Sections 8085 to 8098 has not been followed.<sup>272</sup>

Section 41 (1) of the Act provides that if a partnership is continued upon the assignment of the deceased partner's interest, the creditors of the old firm are creditors of the new firm. Section 41 (3) provides for the same result if the legal representative of the estate does not assign but consents to the continuation. This section is not designed to affect the rights of surviving partners as against the estate of the deceased partner or vice versa, but merely to protect creditors of the old firm.<sup>273</sup> The representative of the deceased is not required to assign or consent. If the articles or the will of the deceased so provide, this right to assign or consent is already recognized under Section 8092 of the Ohio General Code. Furthermore, it appears to be an unobjectionable procedure, even under the existing Ohio statutes, for the legal representative to consent to the continuance of the firm if it is in the best interests of the estate, even in the absence of a provision in the articles or will.<sup>274</sup>

Section 42 accords a representative of the estate the right to obtain interest on his deceased's share in the partnership where the business is continued by the surviving partners in accordance with Section 41. In lieu thereof he may elect profits. As we have seen, this was the common-law rule and it existed along with the

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<sup>272</sup> *Stewart v. Grant*, 24 Ohio L. Abs. 281 (App. 1937).

<sup>273</sup> *M. & C. Creditors Corp. v. Pratt*, 172 Misc. 695, 17 N.Y.S. 2d 240 (1938), *aff'd*, 255 App. Div. 838, 17 N.Y.S. 2d 662 (1938), *appeal denied*, 255 App. Div. 962, 17 N.Y.S. 2d 990 (1938), *aff'd*, 281 N.Y. 804, 24 N.E. 2d 482 (1940); *Blumer Brewing Corp. v. Mayer*, 223 Wis. 540, 269 N.W. 693 (1936).

<sup>274</sup> *Stewart v. Grant*, 24 Ohio L. Abs. 281 (App. 1937).

statutory method of settling the share of the deceased partner.<sup>275</sup> It is not therefore inconsistent with the statute.

Curiously enough, it seems that the only inconsistency between the Ohio statute and the Act in this connection is found in the very last sentence of the last section of the statute. It will be recalled that Ohio courts of equity have recognized two types or degrees of conversion of partnership real estate, *sub modo* and out and out.<sup>276</sup> The language of the statute as to conveyance of the interest of a deceased partner in partnership real estate describes only the latter type. Thus Section 8098 only contemplates the giving of a deed to the surviving partner of real estate purchased by partnership funds where the real estate has been actually used by the partnership. This limitation on the Ohio common law is also contrary to Section 8 (2) of the Act to the effect that partnership property includes all property purchased with partnership funds. Section 8098 would seem to present no problem unless title to real estate purchased with partnership funds but not used by the partnership had been taken in the name of the partners, either separately or jointly. Then, though the surviving partners could by a conveyance in the partnership name transfer an equitable title, it would take an act of the legal representative or the administering court to convey the legal title. It would therefore seem desirable to repeal the last sentence of Section 8098 regardless of adoption of the Act.

#### SUMMARY OF EFFECTS OF ADOPTION OF ACT UPON EXISTING OHIO JUDICIAL AND STATUTORY LAW

It is apparent from the foregoing discussion that in major part the Act is but a restatement and clarification of Ohio law as it is found today in decisions and occasional statutes. This is, of course, hardly surprising when one recalls that its draftsmen fully intended to adopt existing common-law principles so far as they represented any considerable body of consistent and generally accepted material. Ohio, as has been seen, has long been a contributor to this ever accumulating mass of material. The Act's contribution to this large area is necessarily, therefore, in terms of clarity and concise statement of principle.

But there remain two major areas in which the Act, if adopted

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<sup>275</sup> See text page 658, *supra*. In addition, if the surviving partner in fact continues the firm, the Act has been interpreted as according the remedies of Section 42 to the estate of the deceased partner, even though no consent to the continuation of the partnership has been given by the personal representative of the deceased partner, or by the will of the latter, or by the partnership articles. *Froess v. Froess*, 284 Pa. 369, 131 Atl. 276 (1925); *M. & C. Creditor Corp. v. Pratt*, note 273, *supra*.

<sup>276</sup> See text pp. 633-634, *supra*.

in Ohio, would make affirmative and substantial contribution over and above this not unimportant matter of clarification. These relate to the matters of (1) partnership real property and (2) the rights of creditors.

As a term descriptive of the type of estate enjoyed by partners in firm property, the Act adopts "tenancy in partnership" and applies it to both real and personal property. Further, it gives a perceptibly broader connotation to this term than Ohio courts have previously given to "partnership property", in that the phrase "property brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership" is more comprehensive than the usual common-law test of purchase with partnership funds. Moreover, the sum total of various provisions defining a partner's interest in the firm and the rights of firm and separate creditors, would serve to bring about in Ohio an abrogation of the existing doctrine of *sub modo* conversion in equity and to substitute an out-and-out conversion recognizable in both equity and law. Finally, the Act's recognition of the right to convey title to and from the firm in its firm name is an obvious practical convenience as is the provision abolishing dower in "a partner's interest in specific partnership property."

In the second area, that of creditors' rights, the Act establishes a consistent set of provisions substantially more protective of these rights than can be found in Ohio law today. This is outstandingly true where the partnership is continued without liquidation even though a technical dissolution has taken place. Under those circumstances, creditors of the old firm and of the new firm will share equally in all the assets of the new firm. Further, unlike common law, old customers are entitled by the Act to knowledge or notice in cases of dissolution by bankruptcy or death, and new customers are entitled at least to newspaper notice of dissolution. Both provisions are a protection to firm creditors. The charging order provision in the Act gives clarity and immeasurably greater security to the rights of separate creditors who have obtained judgments against individual partners. At the same time it protects appreciably the rights of both firm creditors and the partners themselves by providing a convenient procedure for settling competing interests without disruption of the firm business. General marshalling priorities have been retained as now found in Ohio cases with only occasional variations as to such matters as assets of partnership by estoppel, a partner's personal non-partnership claim against the firm, and the Ohio exception where there are neither firm assets nor solvent living partners—matters actually of rare occurrence in practice. On the other hand, firm creditors who learn of assumption of firm debts by less than all partners or by the successors in in-

terest of retiring partners are required in their dealings with their former joint obligors or their successors to refrain from consenting to any material alteration as though a principal and surety relation exists. In this one instance the Act imposes on firm creditors risks not found in Ohio decisions, but such instances occur but rarely and the Act reflects the attitude prevailing in courts of other states.

Outside of these two areas there are occasional variations, all of which have been indicated in earlier discussion. All are minor and all tend to bring Ohio into conformity with the partnership law of other jurisdictions.

In short, should the Act be enacted here, its over-all contributions to the present state of Ohio law would unquestionably be significant. Clarification of existing principles and conformity to the law of other states are in themselves ample justification for its adoption. But in the two areas of partnership real property and creditors rights the Act would introduce modifications in existing principles that would both stabilize the enterprise and protect firm and separate creditors. All these effects are major and all point persuasively toward enactment of the Uniform Partnership Act in Ohio.